RISING POWER, CREEPING JURISDICTION: CHINA'S LAW OF THE SEA

A Dissertation
Presented to the Faculty of the Graduate School
of Cornell University
in Partial Fulfillment of the Requirements for the Degree of
Doctor of Philosophy

by
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January 2017

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This study explores the relationship between the People's Republic of China (PRC) and the international legal system, with empirical focus on the exclusive economic zone (EEZ) regime as codified in the 1982 Third United Nations Convention on the Law of the Sea. The main pattern explained is China's practice of international law in its maritime disputes, moving beyond a question of "compliance" with the relevant rules to address how China shapes the underlying legal norms, and vice versa. The analysis demonstrates that the EEZ regime transforms Chinese interests in maritime space, enabling the systematic use of legal means of excluding others from disputed space along China's maritime periphery. Backed up by growing capacity (i.e., "rising power") to enforce its claims, China's purposive interpretation and flexible application of the norms of the EEZ regime manifest as "creeping" claims to jurisdiction and rights beyond those contemplated in UNCLOS III. These nominally jurisdictional claims enable the PRC's push toward *closure*, a broader strategic aim to control vital maritime space that includes political, military and economic components. Using a framework adapted from the transnational legal process theory of international law, the study proceeds to analyze Chinese practice in terms of four linked processes: interaction, interpretation, internalization, and implementation. Tracing these processes from China's early encounters with Western international law, through its participation in the conference to draft the law of the sea convention, and into subsequent efforts to incorporate EEZ rules into PRC law and policy, the empirical analysis reveals that China's engagement in transnational legal processes does not result in its obedience to liberal rules and norms. Rather, China's practice in the EEZ transforms the scope and content of those underlying norms, contributing to growing dysfunction in the law of the sea.

BIOGRAPHICAL SKETCH

Isaac B. Kardon (孔适海) is Assistant Professor at the U.S. Naval War College, in Newport, RI. He joined the faculty at the College's Center for Naval Warfare Studies in 2016, and is a core member of the China Maritime Studies Institute. His areas of study and specialization are Chinese politics and law, with research and writing focused on East Asian maritime disputes, PRC foreign policy, and the law of the sea. Prior to joining the faculty at the Naval War College, Isaac was a Visiting Scholar at NYU Law's U.S.-Asia Law Institute (2015-2016) and Adjunct Research Fellow at the National Defense University (2011-2015). During dissertation fieldwork on a Fulbright-Hays award in China (2014-15), he was a Visiting Scholar with the PRC National Institute for South China Sea Studies in Hainan, China, and a Visiting Fellow at Academia Sinica in Taipei. From 2009-2011, he was a Research Analyst at the National Defense University's Center for the Study of Chinese Military Affairs. He has lectured at Peking University, Tsinghua University, and National Taiwan University.

Isaac received his Ph.D. in Government from Cornell University, where his dissertation "Rising Power, Creeping Jurisdiction: China's Law of the Sea" analyzed China's practice of the law of the sea, focusing on the PRC's role in the development of the exclusive economic zone (EEZ) regime. He holds an M.Phil from Oxford University (St. Antony's College) in Modern Chinese Studies, and a B.A. in History from Dartmouth College. He speaks, reads, and writes Italian, Spanish, and Mandarin Chinese.

This dissertation is dedicated to my family: Nancy, James, Sam, Max, and Joe. I am profoundly grateful for their sincere (?) interest and unfailing support – emotional, financial, fraternal – throughout the ups and downs of the research and writing process.

ACKNOWLEDGMENTS

Thanks for very existence of this dissertation, from conception to completion, are due to my committee chair and academic mentor, Peter Katzenstein. His personal care, laser focus, intellectual energy, and unflagging commitment to my development as a scholar made this project possible. He is the consummate teacher, and sets the standard to which I will always aspire.

I am also deeply and permanently indebted to my legal and professional mentors and dear friends, Jerome Cohen and Peter Dutton. Without Jerry's warm welcome to the fine community of scholars at the U.S.-Asia Law Institute at New York University School of Law, I would have had none of the substantive knowledge and personal connections that allowed this study to take form and flourish. He also led me to Peter Dutton, the nation's leading expert on China's maritime disputes, and now a close colleague. Both scholars were not only integral committee members, but also facilitators of research. Their good offices allowed me to enjoy the extraordinary privilege of engaging with the leading American, Chinese, Taiwanese, Vietnamese, and Japanese experts on maritime disputes. Any useful, original research in this dissertation is due directly to the opportunities they furnished.

The Fulbright-Hays program under the U.S. Department of Education provided essential support for my year of field-work in Hainan, Beijing, and Taipei in 2014-2015. During that year, I am especially thankful for access and insights provided by Hong Nong of the PRC National Institute of South China Sea Studies, Jia Qingguo of Peking University, and Zhang Xinjun of Tsinghua University. Funding from Cornell University's Lee Teng-Hui Fellowship was also instrumental, allowing me to decamp to NYU Law to prepare the prospectus.

I could not possibly acknowledge individually each of the many other faculty, colleagues, and friends who offered valued ideas, criticism, and encouragement along the way. Please forgive the omission and know that I am grateful for your generosity.

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Introduction

The EEZ and Maritime Disputes

This study explores the relationship between the People's Republic of China (PRC) and the law of the sea, with empirical focus on the exclusive economic zone (EEZ) regime as codified in the 1982 Third United Nations Convention on the Law of the Sea (UNCLOS III).[1] The main pattern to be explained is China's practice of international law in its maritime disputes, moving beyond a question of "compliance" with the relevant rules to address instead how China shapes the underlying legal norms, and vice versa. The analysis demonstrates that the EEZ regime transforms Chinese interests in maritime space, enabling systematic use of the EEZ regime as a means of excluding others from disputed space along China's maritime periphery. Backed up by growing capacity (i.e., "rising power") to enforce its claims, China's purposive interpretation and flexible application of the norms of the EEZ regime manifest as "creeping" claims to jurisdiction and rights beyond those contemplated in UNCLOS III. These nominally jurisdictional claims enable the PRC's push toward *closure*, a broader strategic aim to control vital maritime space that includes political, military and economic components.

Why study China and the law of the sea? The basic motivation is to understand the crucial legal element of China's conduct in its maritime disputes. These long-standing conflicts with its neighbors concern sovereignty, rights and jurisdiction on and around the

[1] Referred to as UNCLOS III, UNCLOS or the Convention.
[2] China has nine maritime disputes, one with each maritime neighbor: Japan, North Korea, South Korea,

hundreds of tiny islands, rocks and reefs dotting the South and East China Seas (SCS and ECS).[2] The disputes are now, by any reasonable estimate, more significant and more destabilizing than at any time in the past and are unlikely to be resolved in the foreseeable future. One dispute was the subject of a recent arbitral award that China has shrilly rejected (the Philippines-China UNCLOS Annex VII arbitration),[3] and other like suits are threatened by Japan and Vietnam. The disputes lie at the center of escalating American and Chinese competition over access to and use of space under dispute (Dutton 2014). They generate diplomatic and practical problems over crisis management, dispute resolution, law enforcement, navigation, and resource exploitation. The contested maritime domain of East Asia will be an area of major importance for global order for a long time to come, and the law of the sea looms large in any rendering of this problem.

China's relationship to the law of the sea is also an influential case for theory, indicating the potential for international law to produce dysfunction in international politics. All parties agree on the validity of the law of the sea, yet do not agree about the underlying norms of the EEZ, with powerful states practicing according to their lights rather than in line with their legal obligations. This observation challenges the standard, competing explanations that law will have no influence on strong states, or that it will produce a binding contract where all states recognize mutual benefits, or that it will lead once-

[2] China has nine maritime disputes, one with each maritime neighbor: Japan, North Korea, South Korea, Taiwan, the Philippines, Indonesia, Malaysia, Brunei and Vietnam. The disputed Senkaku/Diaoyu islands in the ECS are entirely controlled and administered by Japan. In the SCS, China controls the disputed Paracels group (having seized them in a naval skirmish with Vietnam in 1974), but holds only 7 of the 63 occupied features in the Spratly group (Vietnam has 38, Malaysia 8, the Philippines 9, Taiwan 1). Samuels 1982, Lo 1989, Garver 1992 and Austin 1998 provide good summaries of some of the main facets of these disputes from the perspective of Chinese foreign policy. Fu 1995 offers a more partisan Chinese perspective on the disputes.

[3] Permanent Court of Arbitration, *The Republic of Philippines v. The People's Republic of China*, Case 2013-19 (2013)

uncooperative states to value and obey legal rules. Instead, I argue that international law can also enable state practices that reshape its underlying norms, creating political opportunities for states far beyond obedience or disobedience. International law is a political arena that may transform the states participating in international legal processes, giving rise to new interests in new games constituted by new legal norms. The hopeful expectation that the progressive legalization of international politics will produce ever-wider adherence to liberal norms must be reexamined in light of growing Chinese influence on those norms, which is nowhere more evident than in its maritime disputes.

This study illustrates that dysfunction by examining China's practice in the EEZ. The research demonstrates how the indeterminate norms of that newly-created regime filter through China's domestic political and legal institutions and prompt the state to grow into this new space at the expense of other states. Creeping PRC jurisdictional claims, matched to growing maritime capacity, have allowed the PRC to pursue closure of the vast, disputed maritime zones defined and constituted by the law of the sea. This process has exacerbated existing maritime disputes and undermined the function of the UNCLOS treaty, whose norms are challenged and altered by Chinese practice.

I turn to a theory of transnational legal process to explain this phenomenon, an approach that integrates international law and international relations analysis. The standard theory presents a useful framework for analyzing the various historical stages of China's relationship to the EEZ regime, and issues testable hypotheses of how that relationship should evolve – namely, towards obedience. The theory is heavily normative in character, prescribing energetic use of legal procedures and advocacy to ensure that states do more than simply comply with international law, but rather *obey* it because its liberal norms are

internalized within their legal systems.[4] The contrast between this expectation and observations of China's practice is productive, and stimulates theoretical questions about what alternatives to obedience may result from transnational legal processes and why. The study therefore draws on international relations to complement the lawyer's prescriptive view of international law, explaining how China's engagement in transnational legal processes produces transformative effects – just not the ones intended by liberal-minded analysts. Rather than promoting convergence around liberal norms, the law of the sea constitutes yet another arena of international political contestation. With obvious recent decline in American popular support for underwriting these and other fundamental aspects of the liberal world order, we should consider the increasing potential for profound and illiberal Chinese influence on the progressive development of international law.

Main subjects of inquiry: EEZs and maritime disputes

These transformative effects are especially prominent in the EEZ, which comprises nearly 40% of the water space on the planet. It confers sovereign *rights* to resources – but not *sovereignty* – to coastal states out to 200 nautical miles (nm) from their coastlines. In the EEZ, states exercise specific jurisdiction to prescribe and enforce those rights, which

[4] I employ the term "liberal" throughout this study to refer to the presumption of individual autonomy; state authority exists only where expressly granted. There are many different connotations of the term in contemporary discourse, but all share the notion that individuals (or firms) enjoy substantive freedom to engage in any activity that is not expressly proscribed by law. In international law, the relevant individual may be considered as the state itself. The liberal canon of interpretation is best expressed in the opinion from landmark case of the *SS Lotus*: "…all that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction" (Permanent Court of International Justice 1927: para. 42). A political authority's right to infringe or otherwise limit an individual liberty or right must have a positive basis in law; otherwise, that liberty or right is presumed to be enjoyed by the individual. By contrast, an illiberal view would default to the presumption that the state has authority unless there is a specific positive rule granting a right to an individual.

are (at least in the black letters of the law) exclusively economic. This new zone is at once a radical expansion of the scope of physical space under state authority, and a radical dilution of the degree of authority states may legitimately exercise within their boundaries. China's claims to legal authority within that space – and beyond it – exceed limits prescribed in the Convention. With growing capabilities to assert that authority, China is undertaking practical steps to assert its claims to rights and jurisdiction, drawing it into conflict with other users of the vital maritime space of the East Asian littoral.

These conflicts are most acute in China's maritime disputes with each of its maritime neighbors – Japan, North and South Korea, the Philippines, Malaysia, Brunei, Indonesia, Vietnam, and Taiwan. Disputed sovereignty over various islands is the heart of the disputes, [5] but their political relevance lies primarily in the maritime zones – the EEZ in particular – to which the sovereign can lay claim for economic use. China's creeping jurisdictional claims indicate that it prizes these zones for political and strategic reasons as well. While China has yet to formally declare its EEZ boundaries, in practice it enforces claims to vast EEZs and engages in steady (and increasingly coercive) efforts to exert practical control over contested island territory and surrounding maritime space. China's remarkable contemporary project to build artificial island territory out of sand, coral and cement in these "grey zones" of unresolved state authority is only the latest and most concrete manifestation of a long-standing PRC campaign to assert creeping jurisdiction.

[5] Many of the disputed "islands" are in fact rocks, reefs, atolls, and all variety of submerged or partially submerged mid-ocean feature. There is controversy as to whether many of them can lawfully be claimed as sovereign territory. Nevertheless, sovereign title to these "insular features" is the origin of the disputes. Rights and jurisdiction are allocated in zones radiating outward from land, accruing to the sovereign who owns the territory. They are thus a first-order consequence of sovereignty disputes, and given the trivial size and function of virtually every disputed feature, constitute the principal material stakes in the disputes.

The PRC has staked expansive claims that gesture to UNCLOS norms but depart from them in crucial ways. In arrogating to itself new state authority over ocean space, China broadens the scope and augments the content of UNCLOS norms as they are converted into domestic law and policy. This process transforms the Chinese state apparatus for dealing with the maritime domain, and simultaneously transforms the regional and, perhaps over time, global norms of the EEZ. China is not the only state to seek more authority at sea than the law prescribes, but it does so with greater scale and purpose. China's rising power enables more effective control over ever broader swathes of ocean space. This power is manifest in terms of capacity to *use* – and deny foreign use of – maritime space with an increasingly capable navy, coast guard, merchant marine, and fishing fleet, as well as significantly enhanced capital and technical capacity to exploit oil, gas, minerals, and conduct scientific research. It is recognizable as creeping jurisdiction, an insidious legal process accompanying China's broader strategic push to achieve closure along its vulnerable maritime frontier.

This Chapter introduces the study in Section I by first acquainting the reader with the broad historical contours of global ocean politics that led to the formation of the EEZ regime. Section II establishes that new regime's bearing on maritime disputes, then Section III considers how scholars of international relations have addressed the subject of China's relationship to international law. The chapter concludes with a brief preview of the study and the primary sources used for research. This discussion paves the way for the following chapter's development of a theoretical and methodological framework for studying China's relationship to the law of the sea.

I. Blue Territory: The Landlubber State Takes To The Sea

Some state or another claims sovereignty over every inch of dry land on the planet. Notwithstanding the dismal regularity of bloody conflict over which state owns which geographic space, states by and large recognize and respect other states' sovereign authority over territory. Indeed, territorial sovereignty is the most fundamental rule of the game in international relations, necessary for the existence of the modern state. From the advent of the Westphalian state system – which signifies the sovereign's control of territory *exclusive* of other authority – until the middle of the twentieth century, the boundaries of the state terminated at the water's edge.

More precisely, a state's territorial sovereignty extended a bit beyond the water's edge. States traditionally laid claim to a narrow band of "territorial sea" adjacent to their coastlines. Normally, this zone was about three nautical miles (nm) in breadth — a standard called the "cannon-shot rule," because that distance was once reckoned the effective range of shore-based cannon[6] — and endowed the state with something approaching full sovereign authority.[7] Beyond that short range at which the sovereign could exercise a substantial degree of physical control, however, there was no recognized sovereign authority, only a vast commons. The oceans were truly inter-national: a connective medium, a conduit for trade and communication, a common pool of public resources, and a space of contested control and intermittent naval warfare between states and privateers.

[6] The lack of uniformity of the 3nm territorial sea is well-documented by those trying to identify the moment when a customary rule ripened, but for our purposes the variations in the breadth of zones claimed in this early period (4nm, 6nm) are trivial – the point is there was a narrow territorial sea and no legitimate basis for state authority beyond it.

[7] States developed a variety of customs permitting the traffic of vessels to and from commercial ports and transit through narrow straits.

Beyond the range of coastal artillery, the oceans could not be an object of territorial ownership. This unregulated or open state of oceanic affairs reflected, on the one hand, the basic practical challenges facing any state with designs on meaningful ownership of ocean space. That is, the vast size of the oceans, the technological limitations of vessels and aircraft, insufficient means of collecting intelligence and conducting surveillance, and various other technical constraints meant that states simply lacked capacity to achieve effective military and commercial control over ocean space far from shore.

On the other hand, this openness was purposefully maintained by a succession of maritime-oriented nations with strong navies. Tasked with protection and expansion of far-flung overseas colonial possessions, shipping routes, and commercial interests, these maritime powers mounted concerted efforts to sustain a *mare liberum*, the famous "freedom of the seas" doctrine (Grotius 1609; Potter 1924; Lapidoth 1975; O'Connell 1982; Pirtle 2000).[8] That combination of insufficient human capacity to effectively enclose ocean space, paired with sufficient state power and purpose to stabilize openness as a rule, kept the formal and practical boundaries of the territorial state very close to land for most of the modern era. Widespread beliefs that the seas' resources were limitless and impossible to own or occupy facilitated this relative lack of acquisitiveness on the part of states (Butler 1990), which otherwise engaged in seizing every other part of the earth's

[8] Paul Kennedy, citing famous American naval theorist Alfred Thayer Mahan, notes that "[c]ommand of the sea has never implied a total possession of oceanic waters: this is both physically impossible and strategically unnecessary. For the sea is not, like the land, of much use to man in itself. He cannot live on it, farm it, develop it, buy it or sell it. It is, instead, a medium through which he travels from one land position to another: or, in [Alfred Thayer] Mahan's classic description, it resembles 'a wide common, over which men may pass in all directions, but on which some well-worn paths show that controlling reasons have led them to choose certain lines of travel rather than others.' If it is possible for a nation generally to preserve its traffic along these 'well-worn paths' and to deny this privilege to the enemy, then it would possess command of the sea: its trade would flourish, its links overseas would be maintained, and its troops would pass freely to desired destinations." (Kennedy 1981: 2)

surface and exploiting its resources. The only authority claimed and exercised by states developed slowly, and related to the legal status of seagoing vessels themselves and, later, the individual people aboard them.[9]

Nearly without exception, this norm of free seas prevailed through all of the turmoil of the last four centuries of international politics, all of the dizzying advances in shipbuilding, artillery, and naval technology, and all of the births, deaths, revolutions and transformations of the coastal states nominally in possession of these "territorial" waters (Jessup 1927, Riesenfeld 1942, O'Connell 1982). A strong customary reluctance to territorialize the seas persisted long after the development of sufficient state capacity to use and regulate ocean space beyond the narrow coastal band of the territorial sea. Beginning after World War II, however, state authority over ocean space expanded "with a speed and geographic scope that would be the envy of the most ambitious conquerors in human history" (Oxman 2006: 832).

The historical dominance of the *mare liberum* doctrine and its attendant liberal, laissez-faire norms of international navigation suffered a series of major setbacks in the post-war movement towards *mare clausum*, or a "closed sea" regime.[10] Though this movement was initiated by developed states with capacity to exploit far-flung resources of the

[9] This highly limited, non-territorial form of jurisdiction developed slowly and unevenly in state practice, treaties and, eventually, in jurisprudence. The clearest recognition of this circumstance – no state authority over ocean space, only over the vessels and individuals aboard them – came in the judgment in the Permanent Court of International Justice ruling in *S.S. Lotus* (1927), which confirmed that the "freedom of the high seas is derived from the absence of territorial sovereignty throughout the oceans and the lack of coastal state competence to exercise any kind of jurisdiction over foreign vessels on the open ocean." (Kraska 2011: 134, citing Permanent Court of International Justice 1927, at 25.)

[10] John Selden was the most influential publicist of this thesis, arguing that the British crown *de facto* exercised sovereign control over vast ocean spaces. See Selden 1635.

world's oceans,[11] the developing world soon embraced it and moved to establish explicit, legal norms and rules recognizing exclusive state authority over ever-wider tracts of ocean space. This "contraction and dismemberment of the freedom of the high seas"[12] proceeded through gradual expansion of the scope and deepening of the content of state authority, principally through claims to rights for fishing and resource exploitation in progressively broader zones, and through establishment of new patterns of control by enforcing those rights when other states objected or interfered (Oxman 2006).[13]

A host of material factors gave momentum to this "global enclosure movement," among them: (1) emerging technological capacity and wherewithal to exploit resources – not just fish, but oil, gas and minerals – in waters and seabed farther from shore, (2) growing populations driving greater demands for protein and seabed mineral (especially hydrocarbon) resources, (3) greater awareness of the need to respond to growing environmental damage from reckless maritime practices, (4) urgent demands to prevent the collapse of global fisheries stocks, and (5) newly recognized viability of international organizations as venues for designing and enforcing agreements – especially the United Nations. This latter, historically unique factor ensured that the principal instruments of closure were institutionalized rules and principles, negotiated in international legal settings, typically in the form of multilateral treaties.

[11] The United States was a pioneer in extending the rights of states beyond their territorial seas in the post-war years. Most notable are the Truman Proclamations in 1945, which unilaterally asserted sovereign rights over the fish and mineral resources of the continental shelf and its superjacent waters.
[12] Riesenfeld 1983: 12.
[13] Iceland's expansion of its fishing rights was the proximate cause for the series of "Cod Wars" of the 1950s and 1970s that are generally recognized as a pioneering development in the formation of the EEZ regime. Tommy Koh, the president of the Third UN Conference on the Law of the Sea, ascribes the development of the regime almost entirely to demands for fishing rights and related jurisdiction (Koh 1983)

The law of the sea is the primary body of legal rules and principles governing the world's oceans, a longstanding customary regime that has been progressively developed and, from the mid-twentieth century onward, codified through a series of international conferences. With the signing of UNCLOS III in 1982, the international community recognized coastal state authority over nearly 40% of the waters that had been unrestricted "high seas" for centuries. Though this development depended in the first place upon major advances in technological capacity to use ocean space and resources, it became political reality only through a highly institutionalized process that undercut the traditional dominance of strong maritime states over the law of the sea. The ocean enclosure movement consolidated its territorial effects through legal processes that enabled small, historically marginalized states to pool their interests and bargain effectively for a regime that checked the unlimited authority of the strongest maritime powers (Nye 1975; Keohane and Nye 1977; Keohane 1984; Krasner 1985).

Among other important legal effects, the protracted international negotiations over extended maritime jurisdiction produced an entirely new regime for waters beyond the territorial sea: the exclusive economic zone, or EEZ, extending 200nm from coastal baselines.[14] This unprecedented maritime expansion of the geographic boundaries of the state, coupled with radical dilution of the state's legal authority within those boundaries, created a new arena for international conflict and cooperation.

II. The EEZ Complicates Maritime Disputes

[14] See Article 56, "The Exclusive Economic Zone," UNCLOS III (Appendix A)

Maritime jurisdictional questions relating to the EEZ have come to the fore of international politics in China's many maritime disputes, each of which surfaces pronounced differences between China and other states on the extent of its authority in the new zones established by the long process of ocean enclosure. Five features of this new regime and its bearing on China's disputes warrant elaboration at the outset, as they color the ensuing analysis and will afford the reader an important sense of the basic legal and geographic characteristics of the EEZs of Asia.

(1) The EEZ does not grant the coastal state sovereignty, in the sense of plenary jurisdiction,[15] but rather prescribes only certain *sovereign rights* to resources and *jurisdiction* over specified activities (see UNCLOS III, Part V, reproduced in Appendix A). Consistent with the name of the zone, those rights and jurisdiction are intended to be both exclusive to the coastal state, and limited solely to economic use.

(2) This limited authority reflects a tenuous balance of rights and interests for "coastal" states and "flag" or "user" states operating in the coastal state's jurisdictional zones. It represents a compromise solution between the developing states who advocate for ocean enclosure – i.e., extension of the essentially sovereign territorial sea – and the maritime powers seeking to sustain the existing, liberal order of high seas freedoms, thereby checking the breadth and depth of coastal state authority.[16]

[15] Except where otherwise noted, I use jurisdiction in the following sense: "[a state's] authority to make, apply and enforce rules within a certain geographic area" (Byers 1999: 54). Legal sovereignty is effectively plenary jurisdiction – total authority over anything going on within a given territorial space.

[16] Many jurists lament this compromise and the blurred boundary it creates between sovereign and non-sovereign maritime space. For a severe criticism of the EEZ regime created in Part V of UNCLOS III, see Judge Oda's dissenting opinion in Continental Shelf ["Continental Shelf case"] (Tunisia v. Liyan Araba Jamahiriya), 1982 *I.C.J.* (Judgment of Feb. 24), 4, 157-71.

(3) Even remote off-shore islands fitting certain criteria[17] may be entitled to an EEZ, though the zones themselves cannot be used to lay claim to sovereign title over territory within them. The law of the sea has no bearing on sovereignty itself, instead proceeding from the principle that *la terre domine la mer* (the land dominates the sea). All maritime claims to rights and jurisdiction must originate in sovereignty over land territory.

(4) The radical expansion of state jurisdiction over maritime space created a circumstance in which states with no prior maritime boundary disputes now have them. This problem of maritime delimitation is especially pertinent in the world's many closed and semi-enclosed seas, where opposite and adjacent coasts often lie within 400nm of one another and necessarily create overlapping 200nm EEZs. In consequence, less than half of potential maritime boundaries are even partially delimited to date.[18] These boundaries remain unsettled due in large part to the recent emergence of the boundary disputes resulting from the extended jurisdiction embodied in the EEZ. Even though the disputed space is vast and beyond the capacity of most states to effectively administer and control, states bargain hard for their EEZ entitlements.

(5) China is surrounded by semi-enclosed seas, the South and East China Seas, and thus unavoidably faces overlapping 200nm EEZ claims. These are front and center in its nine maritime disputes (one with each of its maritime neighbors). To date, China has not successfully negotiated the delimitation of a single EEZ boundary, nor even declared its

[17] UNCLOS, Article 121 deals with the regime of islands and lays out certain ambiguous criteria for which "insular features" are entitled to which maritime zones. Only fully-fledged "islands" are entitled to an EEZ.
[18] "The prodigious extension in the breadth of coastal State claims to maritime jurisdiction has resulted in a similarly significant increase in the number of overlapping maritime claims and a consequent proliferation in the number of potential maritime boundaries. This, in turn, helps to explain the profoundly incomplete nature of the maritime political map of the world in contrast to its terrestrial counterpart" (Schofield et al. 2014: 2).

own EEZ boundaries. Although maritime boundary disputes are by no means rare, China is unique in the sheer number and political intensity of its disputes, and in its resistance to accepting a conventionally-defined version of the EEZ.

The Contest for Extra Territoriality

In creating this "specific legal regime of the exclusive economic zone," the delegates to the UNCLOS III conference could not resolve a great many existing controversies about extended maritime rights and jurisdiction, and compounded these with many new controversies. The mixed EEZ regime to which they ultimately agreed afforded the state some "extra territoriality" in the form of property rights and specific jurisdiction over areas that, at least since Grotius, were considered exempt from any ownership.[19] By the mid-twentieth century, state practices were already diverse in terms of which rights and jurisdiction they claimed and exercised, complicating already formidable challenges to finding a common regime that could accommodate all claims. Moreover, the negotiators did not effectively ward off foreseeable conflicts with respect to ambiguities and inconsistencies in this new regime – specifically, how a coastal state's economic rights interact with the navigational rights of user states.

UNCLOS III effected a compromise solution to a complex problem (Riesenfeld 1983, Friedheim 1993). In consequence, the legal and practical effects of the EEZ regime are not at all static because its norms are contested and still evolving in state practice. However indeterminate the regime remains, international courts began recognizing the

[19] There is a foundational debate as to whether the appropriate term for the world's oceans beyond territorial seas is *res communis,* property of all (Grotius 1609) or *res nullius*, property of none but susceptible to acquisition (Selden 1635). In either formulation, the vast space in the EEZ was not under any commonly accepted state authority until UNCLOS III.

EEZ as a binding part of customary international law as early as the *Continental Shelf* (Tunisia v. Libyan Arab Jamahiriya) International Court of Justice (ICJ) ruling in 1982;[20] formally, the EEZ went into effect along with UNCLOS III in 1994 (when the requisite number of states ratified the treaty).

The baked-in political-legal controversy over what the rules actually mean in practice is playing out in consequential ways in the twenty-first century.[21] The strategic and economic stakes of this contest are high. Determination of which state will exercise what type of authority over this large new maritime zone entails, at a minimum, some major distributive consequences. Allocating resources and control is thus predictably the subject of major interstate competition. The EEZ is the locus of political contestation arising from demand for offshore oil and gas, seabed minerals, near- and distant-water fishing grounds (and accompanying requirements for environmental and fisheries protection). Further, piracy, smuggling, arms- and human-trafficking, natural disasters, and a host of other nontraditional maritime security threats also drive states to seek more comprehensive jurisdiction over ocean space. Finally, every strategic and commercial "sea line of communication" (SLOC) runs through at least one EEZ, making the content of coastal state jurisdiction in the EEZ a vital and material concern for a wide spectrum of transnational stakeholders. The development of the law of the sea thus proceeds alongside a rising tide of naval and coast guard competition to control maritime space in

[20] "The concept of the EEZ…may be regarded as a part of modern international law," Continental Shelf, *ICJ* (1982), p. 18, par. 74.
[21] For a thorough international discussion on how to deal with the balance between free navigation and overflight and coastal state rights in EEZs, see the contentious document published by EEZ Group 21 2005, "Guidelines for Navigation and Overflight in the Exclusive Economic Zone. See also Aceves 1996; Pirtle 2000; Van Dyke 2005.

the EEZs of the world in order to secure scarce resources and mitigate maritime security threats.

Given the material rewards of owning more resources and controlling more space, it is not surprising that many states have sought to "territorialize" maritime space by assigning themselves broader and deeper rights to valuable ocean real estate and resources. This tide of "creeping jurisdiction" may be eroding the will and capacity of strong maritime states to enforce openness as the global norm. In the EEZ, this means building up the specific economic jurisdiction provided for in UNCLOS III to augment a state's authority to regulate all manner of conduct in coastal zones in the name of security, development, conservation, and so on.

The PRC is at the vanguard of this movement to consolidate state authority over the EEZ (Dutton 2014), and is engaged in more – and more consequential – maritime disputes than any other state. They center on sovereignty questions, but the advent of the EEZ and its massive entitlements to jurisdiction and rights raises the stakes, compounds their legal complexity, and even creates new disputes over rights and delimitation. Disputing states dispute the meaning of the regime. The Chinese view of the EEZ tends towards greater closure – effected through steadily creeping jurisdiction for the coastal state. The PRC claims broader functional and geographic scope to prescribe and enforce its domestic law, and correspondingly, deny formerly-enjoyed rights and freedoms to user states (in particular, for states claiming to be the coastal state in disputed zones).

III. Assessments of China's practice of international law

Having established the basic historical contours of the EEZ and demonstrating how this nominally legal regime maps onto China's contentious maritime disputes, we now turn to the extant body of work on those disputes. These studies tend to address either the political or legal dimensions of disputes without considering a broader historical context in which these nominally separate subjects are intertwined. By treating China's approach to international law – specifically its growing capacity to shape the law and use it to Chinese advantage – instead of how international law affects a mostly passive China, this analysis departs from conventional wisdom about how growing participation in international institutions influences the character of China's "rise" to global prominence.

A generation of scholars emphasized how China's integration into a variety of international institutions based on treaties and other legal norms nurtured more cooperative elements of China's post-Mao reform and opening. Generally, they applauded the PRC's growing integration into the international legal system as an important reason for its relatively low-key, non-revisionist foreign policy (Jacobson and Oksenberg 1990; Pearson 1999; Johnston 2003, 2008; Kent 2002, 2007). The greater China's entanglement with legal institutions governing trade, human rights, arms control, and so on, the greater its acceptance of their cooperative norms. Most recognized the potential for China to play a disruptive role (Feinerman 1995), but argued against its likelihood given clear Chinese interests in a "peaceful rise" within the existing order. China's long-anticipated move from "norm-taker" to "norm-maker" is evidently afoot, and seems to include a role as a "norm-shaker" (Kim 1999) in the case of the law of the sea.

China is a founding member and vocal party to UNCLOS III, yet its formal acceptance of the regime belies significant practical rejection of certain core law of the sea principles and norms in its maritime disputes. These practices are often described as a pattern of "assertiveness" (Fravel and Swaine 2011; Johnston 2013), marked by Chinese claims to territory, jurisdiction, and sovereign rights claimed and, in many cases, exercised by neighboring states. Chinese conduct in these disputes departs markedly from the "peaceful rise" reassurance strategy thought to guide Chinese statecraft since the beginning of the reform period (Goldstein 2005). Especially given China's successful management of nearly all of its contested land boundaries (Fravel 2008), its failure to fully settle[22] even one of its maritime boundaries is remarkable and worrisome.

With the intensification of disputes in recent years, students of Chinese foreign policy and Asian international relations are struggling to reconcile China's conduct in its maritime disputes with the once predominant view of the many virtues of China's participation in international institutions. The theoretically-grounded notion that China would be bound or otherwise constrained by its international legal obligations due in part to pressures of socialization[23] is giving way to accumulating empirical evidence that such socialization is more complex and not always accompanied by the anticipated salutary effects. At a minimum, it is a two-way street: China is not just a socializee. Its practice may influence the norms as much as China is influenced by them.

[22] The partial delimitation of a small section of its maritime boundary with Vietnam in 2000 is a qualified exception. See Kardon 2015.

[23] Checkel describes the generic view of socialization as a "process of inducting actors into the norms and rules of a given community. Its outcome is sustained compliance based on the internalization of these new norms. In adopting community rules, socialization implies that an agent switches from following a logic of consequences to a logic of appropriateness; this adoption is sustained over time and is quite independent form a particular structure of material incentives and sanctions" (Checkel 2005: 804).

The tendency of Western scholars to characterize China's relationship to the outside world in terms of "impact-response" (Cohen 1984)[24] is markedly less persuasive in this era of China's revival as a great power with sufficient autonomy to generate "impact" on its own. International law is one arena in which this impact is to be expected. Experienced scholar-practitioners are increasingly open to the theoretical and practical validity of the thesis that "a rising China, especially an authoritarian one, will want to rewrite the rules of the current international order, not accommodate itself to those rules."[25] Nowhere is this competition over "the rules" more acute and consequential than in the littorals of East Asia, yet no systematic work has addressed China's attitude toward and practice of the law of the sea. This study seeks to do precisely that, and in so doing, to explore the processes by which China is influencing a major strand in the normative fabric of international politics.

Several China scholars have employed this kind of functionally-specific analysis to good effect. An early study of China's participation in the United Nations by Kim (1978) "illustrate[d] China's selective, pragmatic, and opportunistic posture on legal issues."[26] Drawing preliminary judgments based on the PRC's first few years representing China in the UN, Kim recognized a "contradictory mixture of qualified acceptance of traditional international law, on the one hand, and a revisionist challenge to destroy the old legal order and to establish a new one, on the other."[27] A decade later, another Kim study of China in multilateral treaties diagnosed a shift from "a value-oriented to a functional,

[24] Paul Cohen (1984) criticized the limitations and ethnocentrism of this style of analysis, characteristic of the "Fairbank" school in Chinese historiography, which explained major developments in modern China's society and politics as largely a result of its encounter with the West. For an especially clear statement of this thesis, see Teng and Fairbank 1979.
[25] Christensen 2015: 54
[26] Kim 1978: 335
[27] *Ibid.:* 347

interest-oriented direction" in Chinese practice (Kim 1987). Many later scholars provisionally accepted this thesis of a pragmatic Chinese approach to international law, noting (or hoping) that the "revisionist" strain in China's attitude toward international law might be tempered by increasing familiarity with international legal institutions. Jacobsen and Oksenberg (1990), for example, focused on China's participation in the Bretton Woods economic institutions, highlighting the emergence of "non-coerced cooperation" (159) driven by changes to China's domestic political institutions engendered by the norms and procedures of those economic regimes.

More recent analysis makes good use of accumulating evidence of Chinese practices regarding important international legal norms. Carlson (2005) addressed the nuances of China's post-Mao approach to issues of sovereignty by isolating various "boundary-reinforcing" as well as "boundary-transgressing" facets of Chinese practice. His study rectified the prevailing view that China is uniformly "hypersovereigntist," demonstrating that China's interaction with that central norm of international politics has not produced either/or outcomes. Instead, a distinctive Chinese discourse and political process led to (theoretically) unexpected and non-uniform changes in foreign policy. In this vein, Johnston (2008) produced a rigorous, theoretically-grounded account of the "microprocesses" of China's grudging compliance and gradual acceptance of various arms control institutions. Yet, even as he condemns the "teleology of socialization"[28] toward inevitable cooperation and harmony, Johnston analyzes only positive cases in which China changed its conduct (and sometimes its underlying beliefs) in line with prevailing, cooperative (typically liberal) norms of the institutions it had joined.

[28] Johnston 2008: xxiv

Non-cooperative outcomes are seldom analyzed with the same devotion as the feel-good stories about cooperation. That potential is not ignored, just made conditional and left aside as theoretically uninteresting – perhaps because it strengthens a somewhat cynical thesis about the limits (or irrelevance) of international law (Goldsmith and Posner 2006). Instead, China scholars tend to emphasize the pro-social, non-disruptive aspects of China's integration. Johnston concludes that "China has joined most international institutions that regulate interstate behavior; inside the institutions, [China] generally has not tried to undermine the functioning or purposes of the institutions; and increasingly, Chinese foreign policy accepts that for the foreseeable future it will have to accommodate US hegemony, or when it must be challenged, it will do so mainly inside international institutions."[29] Yet since 2008, by nearly any account (including Johnston's own)[30] China is mounting a fairly direct challenge to the "functioning" and "purposes" of the law of the sea, and in ways that transcend mere legalistic maneuvering within parameters defined by a treaty organization.

China's maritime disputes should therefore inform our broader assessment of the consequences, good and bad, of PRC integration into international (legal) institutions. Rather than join a chorus of cynical voices who appraise this development as irrefutable evidence of an inexorable "contest for supremacy" (Friedberg 2011) or an indicator of the

[29] Johnston 2008: 207-208

[30] Johnston finds much of the hand-wringing about China's "assertiveness" to be poorly founded in logic and fact, *except* when it comes to their aggressive exercise of maritime jurisdiction: "[t]he only clear example of new assertiveness in Chinese foreign policy in the last few years has been in maritime spaces along China's periphery" (Johnston 2013: 41). He goes on to describe this assertiveness: "PRC presence activities have generally increased in the last few years (e.g., more frequent patrols by various maritime-related administrative agencies, more risk-acceptant action to defend Chinese fishing activities, the encouragement of tourism, and more vigorous diplomatic pushback against other state's claims). Judging from the responses of other countries in the region, these activities clearly contributed to an escalation of tension in the East Asian maritime space" (*Ibid.,* 46).

inevitable Chinese bid for regional hegemony (Mearsheimer 2001), this study seeks to first understand the underlying regime and then analyze the particular ways in which China has or has not sought to revise "the rules" in non-cooperative fashion.

The missing (maritime) legal element in studies of maritime disputes

To date, analysis of China's conduct in maritime disputes is incomplete because it has not been grounded functionally in the law of the sea. This is true even of the most persuasive and theoretically-informed IR work on China's maritime disputes, Taylor Fravel's *Strong Borders Secure Nations* (2008). He developed an original theory that explains how and why China has managed to settle nearly all of its many sovereignty disputes, those over islands among them. He debunked the widely held view that China was more prone to escalation in such disputes than are other states,[31] and described a robust pattern of cooperation – especially with weaker neighbors, and especially on land borders.[32] Fravel's book is the so-called "category-killer" on China's territorial disputes, but does not succeed in killing off the maritime dispute category.

This is so because the study does not distinguish the theoretical bases for disputes over land boundaries from disputes over islands and their associated maritime zones. Yet these "offshore island disputes" buck the otherwise robust empirical pattern explained in his theory. Indeed, island disputes are addressed almost parenthetically, despite the fact that

[31] Early studies of Chinese territorial disputes had concluded that China was more prone to escalation and, indeed, had a political-military preference for limited use of force for non-tactical, even ideological purposes (Whiting 1996; Christensen 1996; Johnston 1998).

[32] Fravel notes that China has had more territorial disputes than any other state since the end of WWII but "has been more likely to compromise over disputed territory and less likely to use force than many policy analysts assert, international relations theories might predict, or China scholars expect" (Fravel 2008: 3). Fravel describes this pattern as a "mostly status-quo approach toward consolidating control of the territory believed to be part of a modern Chinese state" (Fravel 2008: 313).

they represent six of only twenty-three total border disputes. Islands also account for two of the six instances of escalation that Fravel codes, and only one of the seventeen episodes of compromise.[33] While the numbers are small, they demonstrate disproportionate escalation and notable lack of cooperation in the maritime domain.

Whereas China's observed conduct in terrestrial disputes is a good fit for his theory that escalation serves to check deteriorating claim strength[34] and that compromise is pursued to mitigate internal security threats,[35] Fravel needs an auxiliary, under-theorized category for the maritime disputes: "delay."[36] Delay is the dominant pattern in the maritime disputes because it is relatively cheap for states to maintain maritime disputes, where only nominal publicity for the claim suffices to sustain a state's position in the dispute. This assumption of "cheapness" may have applied in an earlier era, but should be reconsidered in light of the considerable diplomatic and operational friction in these disputes since 2009, their correspondingly high resource demands, and growing prominence as a major liability in China's regional and global diplomacy. The opportunity cost argument he deploys is logically compelling, but no longer tenable based on empirical observation. China is spending a great deal of money and enduring

[33] These instances of escalation in the maritime domain (naval skirmishes with Vietnam over the Paracels in 1974 and the Spratlys in 1988) were also unlike the terrestrial escalations: neither of those disputes was terminated or otherwise resolved by the action, so they still remain on the docket of active disputes. Moreover, that one (of seventeen) instances of compromise that took place in the maritime domain (the cession of White Dragon Tail Island [白龙尾岛] in 1957) is also not a good match for his other coded compromises: the island was ceded, but the waters surrounding it were not "compromise" in the area in question (the Gulf of Tonkin) was not achieved until 2004. This compromise doesn't "count" for Fravel because it concerns a maritime boundary and jurisdictional competences rather than the sovereign title to territory.

[34] Fravel's theory of escalation is more complex, but basically views decisions to escalate as a function of the relationship between state's claim strength, the value of the territory, and its ability to project power into the disputed area.

[35] Also to manage external security threats, though the internal explanation was more prevalent. This contradicted the commonly held belief that China would escalate its border conflicts to distract from internal instability or insecurity.

[36] Fravel 2008: 268-270

substantial diplomatic costs to consolidate claims, in a pattern of behavior that strains any commonsense understanding of a "delay" strategy. Especially in light of the frequent paramilitary "escalation" in disputed zones and China's long-standing but still-born policy of "compromise" (in the form of joint-development), his theory bears reexamination and revision.[37]

One crucial reason these maritime disputes are difficult to shoehorn into a mainly terrestrial theory is that they implicate not just territorial sovereignty but also maritime jurisdiction – a category Fravel explicitly places outside the scope of his theory.[38] This perhaps understandable sin of omission makes clear why the theory cannot account for maritime disputes as successfully as it does terrestrial ones. The land at stake is trivial, at least in material terms. Nearly all of the islands are tiny, uninhabited and mostly devoid of economic value. The maritime zones around them are where the resources lie (or swim), and also where the disputes themselves play out in the form of military activities, navigation, law enforcement, fishing, scientific research, etc. In the maritime domain, it is the jurisdictional zones that territorial sovereignty over islands can generate that comprise the scarce resources at stake in the disputes. The actors involved are generally not military, the stakes are not territory, and the empirical pattern diverges dramatically from that observed so robustly on terra firma.

Fravel shores up some of these issues in later work specific to each dispute, differentiating the domains by arguing that "maritime sovereignty…is weaker than

[37] "主权在我，搁置争议，共同开发" [Sovereignty is ours, shelve the disputes and pursue joint development] is the policy prescription China's paramount leader, Deng Xiaoping, issued in 1978 with respect to disputes with Japan. It became the principal rhetorical plank of China's diplomatic rhetoric regarding its maritime disputes, at least up to 2014.
[38] Fravel 2008: 10

territorial sovereignty."[39] He claims that the existence of complex jurisdictional issues that can be separated from the core question of territorial sovereignty generates policy options and facilitates "active dispute management" that seems to "limit the potential for escalation."[40] This complexity enables China to pursue a "delaying strategy that seeks to consolidate China's claims and deter other states from strengthening their own claims."[41] This purported strategy assigns a substantial role for PRC civilian maritime law enforcement agencies, rather than the PLA Navy, which can maintain and prosecute China's claims in a politically cheaper, more limited fashion. These are welcome amendments, a "jurisdictional turn" in work on China's maritime disputes that this study pursues further, diving deeper into the patterns of practice that are explicable only in terms of the specific legal claims they target.

This jurisdictional turn points to the EEZ as the key zone in question because of its sheer size, recent vintage, and the indeterminacy surrounding the specific rights and jurisdiction it affords the coastal state. Consider that the surface area of the entire Senkaku/Diaoyu island group that generates so much strife between China and Japan is a mere seven square kilometers; its sole mammalian inhabitants are goats, and no resources have been exploited on the "islands" since a Japanese bonito flake factory on the biggest island went out of business in 1940.[42] The Spratly group, though composed of some 140 insular features, has no more than 2.5 km^2 of above-tide surface area (prior to the 2013-2015 PRC island-building campaign) and hosts only garrisoned troops and maritime law enforcement personnel as inhabitants. Compare that miniscule size and negligible

[39] Fravel 2010: 146
[40] *Ibid.:* 145
[41] Fravel 2011: 313
[42] Kaneko 2010: 3

function to over 430,000 km^2 of EEZ that *each* island could, in principle, generate.[43]

These important yet technical jurisdictional issues are largely distinct from the sovereignty issues, the primary subject of nationalist outrage over lost territory (Downs and Saunders 1999; Ross 2009; Ciorciari and Weiss 2012; Wallace and Weiss 2015). It is now axiomatic that domestic nationalism encourages PRC leaders (who themselves spur that very nationalism) to "bargain hard" for all of the stakes in maritime disputes, perhaps far out of proportion to their economic and strategic value. The specific legal interpretations and practices undertaken by the state to prosecute its claims, however, are known only to a very small, specialized community (e.g., law of the sea experts, coastal province bureaucrats, fishing and offshore energy interests). This study proceeds from the assumption that this specialized community is empowered to act due to the salience of these issues in domestic politics (and develops this logic further in Chapter 4), respecting that the origins and dynamics of nationalism in China lie far beyond the scope of this inquiry. At hand is the narrower question of how the law of the sea influences China's conduct in its maritime disputes, and reciprocally, how China's practices influence the law of the sea.

IV. Overview of the Study and Sources

This introductory chapter established the importance of the subject and the demand for specialized analysis on the legal dimensions of China's maritime disputes. Each subsequent chapter relies principally on Chinese and Western academic writing in law and policy journals on law of the sea issues. Each also draws extensively on author

[43] This figure represents the scope of jurisdiction if the radius of the zone is calculated from a single point. Given that any island capable of rating an EEZ would have a non-trivial size, the actual zone would be somewhat larger.

interviews and conversations with Chinese academics, military and civilian officials, and government think-tank experts conducted during fieldwork in China in 2012 and in 2014-15; during the latter period, many of these conversations came during conferences and workshops as a visiting scholar at the PRC National Institute for South China Sea Studies, a think tank in Hainan (the province nominally administering all of China's disputed South China Sea Claims) that was actively engaged in developing PRC maritime law and policy (and advocating existing policy).[44] In parallel, as a rapporteur for two separate and ongoing UNCLOS track II dialogues from 2012 to present, the author engaged with leading Chinese scholars and officials addressing legal and security aspects of PRC maritime disputes. Due to the sensitivity of the subject for Chinese scholars and practitioners, there are no references to specific names of people involved in interviews and discussions.

Chapter 1 lays out a theoretical approach that challenges the expectation that growing engagement in international law is likely to produce Chinese "obedience" to liberal norms. The theory of transnational legal process, modified to the case at hand, tees up empirical chapters that individually treat the theorized processes by which Chinese actors are influenced, and exert influence upon, the EEZ regime. Chapter 2 examines the UNCLOS III negotiations, detailing the PRC's positions and situating them in broader geopolitical and historical context. Drawing on the minutes of the conference, Chinese legislative records, and Chinese scholarly commentary, this analysis surfaces a distinctive Chinese interpretation of the purpose and function of international law. That interpretation is the subject of Chapter 3, which surveys China's traditional and

[44] Appendix D discusses fieldwork techniques and salient features of conducting research in the PRC.

contemporary attitude toward law, the law of the sea in particular. Through examination of influential pedagogical texts used to teach international law (and the history of international law) in China, a basically instrumental and fundamentally illiberal approach shines through. Chapter 4 then examines the PRC's domestic legal institutions, analyzing key statutes and regulations to demonstrate the indeterminate process by which international treaty norms enter the Chinese state. Having established the primacy of political actors in making determinations about if and how international legal norms become domestic law, Chapter 5 then moves to examine the specific process by which the PRC has practiced in EEZ. The empirical analysis centers on the black letters of PRC national legislation, administrative regulations, and departmental rules, which in their indeterminacy permit massive political discretion to official actors to expand the content, scope and function of the state in line with China's putative "maritime rights and interests." A concluding chapter then summarizes the theoretical and empirical contributions of the study and suggests possible extensions into other legal domains beyond the law of the sea.

Chapter 1

Four *i*'s: A Practical Theory for China and the Law of the Sea

Rules and norms codified in international law figure prominently in China's maritime disputes. Such disputes are hardly conceivable in the absence of the parties' adversarial positions on sovereign title, jurisdictional entitlements, property rights over resources – in short, their respective claims on to legal rights legal obligations. Yet even if the law of the sea "matters" in some technical sense, its practical function in these disputes (if any) is not so obvious. Does it directly cause some observable pattern of behavior? Does it meaningfully constrain actions that might otherwise be taken? Does it prompt actions that might not otherwise be necessary? Does it encourage cooperation or sow seeds of conflict? Can Chinese practice in the EEZ tell us anything about how international law functions? This chapter explores theoretical approaches to those questions and proposes a model of transnational legal process that captures the key dynamics of China's engagement with the law of the sea, an influential case that can yield broader insight into international law's transformative potential in international politics.

Legal practice can be observed in a state's black-letter laws and regulations as well as the administrative and law enforcement activities it undertakes in the EEZ to exercise its jurisdiction.[1] In turning to the jurisdictional elements of the disputes, this study aims to fine-tune our sense of the legal relevance of the observed conduct in disputes, the precise geography of activity, the resources in play, and the actual content of the claims. By reference to dynamics

[1] In standard public international law texts, these are two of the three principle forms of state jurisdiction:

specific to the EEZ, we can actually describe the physical space in which much of the drama plays out, "see" the major distributional issues at stake, and identify some of the concrete practices the PRC adopts to prosecute its claims. Those latter practices are best described as concerted PRC efforts to *prescribe and enforce domestic laws in disputed zones*. The PRC does so with a growing body of legislation and regulation on the law of the sea, a massively augmented maritime-related bureaucracy charged with administering China's claimed rights, and a fleet of nominally civilian coast guard "white hulls"[2] enforcing those rights in grey zones of undetermined jurisdiction. It is these practices that produce much of the observed friction and controversy in these maritime disputes and are best treated, analytically, as China's practice of maritime law in its claimed EEZs.

Theorizing Maritime Law and Politics

The disciplines of international relations (IR) and international law (IL) furnish useful conceptual tools to define and structure the inquiry, but there is no handy "off-the-shelf" theory for examining this kind of phenomenon. Perhaps because the theoretical apparatus for dealing with such disputes in IR is designed with territorial issues in mind, behavior in a non-sovereign zone is hard to categorize.[3] The presumption that some historical boundary exists informs this work, and makes the legal "creation" of new territorial space (as in the case of the EEZ) impossible to

[2] Civilian vessels with white hulls enforce domestic maritime law; naval vessels, by contrast, have grey hulls and typically have no law enforcement responsibility. Chinese interlocutors express a general belief that actions by paramilitary law enforcement vessels are less escalatory than comparable actions undertaken by naval vessels (author interviews with maritime security specialists in Hainan and Beijing, April 2014-March 2015). See also Hong 2014.

[3] A fairly comprehensive, recent review of literature on territorial disputes is found in Vasquez 2009: 135-164. The presence of permanent populations, settled economic activity, and fixed military capabilities that characterize disputed land are basic assumptions informing this body of research, but are hardly applicable in the maritime domain. Furthermore, the Militarized Interstate Dispute data so frequently used by researchers to make generalizable claims about territorial disputes fails to distinguish between terrestrial and maritime domains, and has no coding rule to deal with conflict in "grey zones" like disputed EEZs. See also Hensel in Vasquez 2000 and Lemke 2002 for discussions about geographic proximity as a parameter in militarized dispute behavior that also fails to account for distant maritime boundaries.

evaluate (Simmons 2005, Carter and Goemans 2011). Legal differences regarding specific jurisdiction and sovereign rights necessarily fall out, as do observation and consideration of their possible practical effects on the onset, dynamics, and resolution of the disputes.

Concepts and research tools need to be tailored to the EEZ, which is not easily pigeonholed as an exclusively economic regime, nor profitably detached from the broader customary and conventional regime of the law of the sea[4] in which it is nested. Its rules and norms are not comprehensible or legally coherent without reference to the vast body of public international law, customary and conventional, from which it arises. In parallel, even if important dynamics of maritime disputes are understandable only by reference to the wider legal order, explanation of China's particular legal practices demands consideration of the historical and political context from which the arise. A systematic, hybrid approach is warranted, marrying insights from international law and international relations, and tempered by close attention to their applicability to China's unique geopolitical circumstances and distinctive legal institutions.

This will not be the first effort to cast the law of the sea in the context of international politics. In a marked departure from the IR field's near-singular focus on the high politics of security, scholars in the 1970s addressed the "complex interdependence" (Keohane and Nye 1977) of states in transnational economic and security networks, and enmeshed in norm-creating multilateral institutions. Some devoted attention to the UNCLOS III treaty, which highlighted

[4] This is not synonymous with UNCLOS III, nor even its combination with UNCLOS I and II – rather, the generic term "law of the sea" refers to the entire "public order of the oceans" (Burke and McDougal 1962), composed primarily of customary international law and associated international practice, as well as the UNCLOS treaties and related international organizations (like the International Maritime Organization, or the International Seabed Authority). The EEZ regime functions interdependently with other parts of the law of the sea, and refers frequently to other aspects of the law of the sea as limiting and enabling elements of the various rights and obligations it creates.

many of the complex trade-offs characteristic of an interdependent system.[5] This work fit into an emerging "regime theory" enterprise (Krasner 1983), which addressed this complexity with the concept of regimes: sets of principles, rules, norms, and decision-making procedures in a given issue area of international politics. Even as regime theorists scrupulously avoided "the 'L' word"[6] – namely law, which was tacitly the variable (whether independent or intervening) under scrutiny – they shed light on how it helped foster cooperative behavior among competitive states. This agenda soon fractured into competing theoretical and methodological fiefdoms,[7] but signaled a dawning convergence between international law and international relations fields that has been carried on in vibrant interdisciplinary work.[8]

Work in this vein focuses on trade, human rights, arms control, environmental protection, and a host of other critical subjects in international politics. Despite the impressive participation of the international community in UNCLOS III (168 parties) and its significant bearing on global trade, environment, and security, the law of the sea has almost entirely eluded study as an interdisciplinary subject. Work on the EEZ regime has been almost exclusively written for professional legal audiences.[9] This may be because the EEZ is a specialized body of law marked by exquisite hair-splitting on arcane subjects. It is also likely a result of the ocean's poor fit with our standard, sovereignty-oriented model of world politics. For contemporary IR, the EEZ in

[5] Nye, for example, highlights the "non-traditional" roles of multinational firms, international organizations like the UN, transnational scientific bodies, and relates them to traditional actors like state governments and navies (Nye 1975: 37-41).
[6] Chayes and Chayes 1995: 303 fn 3
[7] See Hasenclever, Mayer, and Rittberger 2000 and Rittberger 1995 for fuller discussion of this disciplinary issue.
[8] Summaries of the burgeoning work in this interdisciplinary vein can be found in Abbott 1989; Ratner and Slaughter 1999; Abbott, et al. 2000; Hafner-Burton, Victor, and Lupu 2012; Dunoff and Pollack 2013.
[9] A number of law journals are almost entirely devoted to law of the sea issues, including *Marine Policy, Journal of Marine and Coastal Law, Ocean Development and International Law,* and a series of volumes comprised mostly of proceedings from Law of the Sea Conferences as well as commentary by leading LOS scholars, published by Brill, Martinus Nijhoff, and other specialized publishing houses. The EEZ is also extensively covered in many textbooks and monographs pitched to professional legal audiences, among them O'Connell 1982, Kwiatkowska 1989, Churchill and Lowe 1999, Rothwell and Stephens 2010, Tanaka 2012, Rothwell et al (eds.) 2015

particular is neither fish nor fowl: it is "more like something that might have existed under feudalism, where different activities within the same territory were subject to different rules, than under sovereignty in which the expectation is that all activities within a given territory will be controlled by one single authority."[10] It is not clear whether the EEZ is a zone of domestic or international politics, nor whether it should indeed be treated as an *exclusively* economic zone, given the major security implications of the regulated space. At a more granular level, the basic indeterminacy and contestation embedded within many EEZ rules makes it impossible to diligently apply the narrow but potentially powerful, deductive tools favored in rationalist social-scientific analyses.

In light of this analytical challenge, this chapter develops a theoretical approach to the case by bringing to bear insights from international relations in an adaptation of the "transnational legal process" theory employed by Harold Koh and other practicing international lawyers. The major contribution is to extend that standard legal analysis into an "implementation" phase, which better accounts for a disjuncture between putatively liberal norms and decidedly illiberal practices. Section I sketches certain basic propositions about the role of international law in international politics and argues that they offer incomplete but useful explanations. Section II draws on these diverse explanatory insights to harness the considerable descriptive power of a legal process-based model of how international law functions, but challenges its liberal bias. Section III proposes modifications to the theory of transnational legal process composed of 4 *i*'s – interaction, interpretation, internalization, and implementation – and highlights the important role of indeterminacy in all of these processes. Section IV describes the method by which this modified theory can be applied and comments on case selection.

[10] Krasner 2011: xiii

I. What Does International Law Do? The View from Power, Contract, and Norms

How does the law of the sea influence China's conduct in its maritime disputes? China specialists are torn on the one hand between an expectation that participation in multilateral treaty organizations like UNCLOS promotes PRC acceptance of cooperative norms, and on the other that China is bucking the norms of the treaty to pursue an assertive maritime strategy. This latter view complements the broader worry in IR that a rising China is a revisionist China that will subvert or replace those institutions; the former reinforces a faith in the socializing power of international institutions and the norms they purvey. This tension reflects a basic disagreement in international relations theory about what, if anything, international law actually does. This study does not seek to adjudicate between competing theoretical claims on this foundational issue. Rather, it aims to apply theory to guide an empirical inquiry into a practical problem. To this end, the subsequent brief discussion of the basic propositions of international relations on international law[11] demonstrates that no general orientation is a good fit for the basic empirical contours of the case at hand. By teasing out second-order implications, however, we can then mine the theories for specific insights that guide development of an appropriate theoretical framework for analyzing China and the law of the sea.

One cluster of theories gives analytical pride of place to *power,* and asks how laws reflect and perpetuate the material and ideological interests of the states from which they emerge (Carr 1946; Morgenthau 1948; Gilpin 1981; Krasner 1999; Goldsmith and Posner 2006). Another major school emphasizes the function of legal institutions and asks about the conditions under which self-interested states will create, join, and enforce treaties and agreements (Abbott et al.

[11] I also cite international law scholars who consciously apply these IR insights into their work. Dunoff and Pollack 2013 offer a comprehensive survey of the growing collaboration between the fields.

2000; Hathaway 2005; Simmons 2009, Goodman and Jinks 2013) – that is, why they *contract* into cooperative regimes. *Norms,* meanwhile, are the locus of diverse inquiries into how law operates in world politics, emphasizing the social qualities of legal institutions and processes and the important role of identity informing choices (Kratochwil 1989; Ruggie 1998; Reus-Smit 2004). Other norm-oriented efforts focus on the transnational links among non-state actors, charting the emergence, development and demise of legal norms and associated rules (Finnemore 1996; Keck and Sikkink 1998; Price 2004) that belie an instrumentally rationally account of state interests. Through these three "lenses" for viewing the politics of international law, we see three modal answers (and accompanying explanations) for international law's influence on the state.

Power: No influence. The strictest power-centric approaches, when deigning to consider the role of international law at all, dictate a one-way, dead-end street: strong states make and use international law to suit their interests. Those laws do not meaningfully constrain them – still less so if the law bears on core state interests in security.[12] The advent of international laws may well be correlated with systematic behavioral changes consistent with those laws, especially among weak states, but we ought not explain such changes as functions of the law, *per se.* From a strict power standpoint, international law is epiphenomenal.[13] The more "basic causal factors" (Krasner 1982a) are the interests, defined in terms of power (Morgenthau 1948), of the strong state or states that make and enforce legal rules. International laws will change as the relative power of states to dictate and enforce them changes. This logic reasonably explains rule-

[12] The basic axiom is that states in an anarchic system must engage in "self-help" to ensure their survival (Waltz 1979). National security (or survival) interests trump any other consideration, and determine behavior: "where international norms (and international law backed by norms) run contrary to state security interests, security interests will prevail and norms-based international law will not constrain behavior" (Steinberg 2013: 152).

[13] Goldsmith and Posner (1999, 2006) borrow extensively from IR to develop this logic in a comprehensive theory of "the limits of international law": "[n]ations do not act in accordance with a norm that they feel obliged to follow; the act because it is in their interest to do so. The norm does not cause the nations' behavior; it reflects their behavior" (Goldsmith and Posner 1999: 1132).

conformity by weak states (who obey in order to avoid punishment) as well as by strong states (who establish and generally adhere to rules that satisfy their existing interests).[14]

The fact that UNCLOS III, and especially its EEZ regime, was opposed by the most powerful states from its inception is sufficient grounds to throw out a strict power explanation in which rules simply reflect the interests of strong states. The strongest states in the system, United States and the Soviet Union, uncharacteristically found common cause in resisting this new regime, hoping to maintain more open access to littoral waters for strategic and economic purposes (Nye 1975; Hollick 1981; Friedheim 1993). So too did Japan, the UK, and other European states with substantial maritime capabilities. The UNCLOS III treaty process was a response to Third World demands for equity in the world's ocean resources. This rule-setting came at the expense of the strong states, which preferred a liberal, unregulated regime to the non-market allocations successfully promoted by the developing world (Krasner 1985). If we proceed with the notion that those rules are simply a reflection of the interests of the powerful, we do considerable violence to the clear history of the regime, and neglect consideration of the interests it actually codifies.

Nonetheless, there is an important element of a power-centric approach worth salvaging and considering in this case. What happens when the link between power and law is attenuated or even severed? International law that does *not* conform to the interests of powerful states (or reflects only those of some powerful states but not others) will not reliably generate clear and stable norms for weaker states to obey. If international law is out of step with the distribution of power that structures the system of international politics, the rules it prescribes may be

[14] International law thus functions as an adjunct to more fundamental power dynamics, with strong states able "to use international law instead for the promotion of their national interests" (Morgenthau 1948: 299).

dysfunctional.[15] That is, without the coercive threat of power underlying the rules, without the full-throated support of strong states, the law does not necessarily cease to exist – rather, it becomes a venue of political contestation, subject to change, decay or replacement.

Contract: Constraining influence.[16] The core argument from contract expects international law to meaningfully influence states if compliance with the law has a higher utility than non-compliance.[17] The robustness of that influence – that is, the likelihood of compliance – will depend on how much utility is at stake (however defined and operationalized). By virtue of contracting (or consenting), states commit to undertake prescribed actions that reduce uncertainty and transaction costs for all contracting parties, leading to positive feedback for the constraining effects of international laws.[18] Following this logic, even powerful states may be effectively "constrained by the international legal system."[19] Contracting states do not exert any individual influence on international law as they do in the power approach, where powerful states willfully create international law to promote their own interests. Instead, international law-as-contract emerges as a functional solution to a collective action problem, a Pareto-improving product of

[15] "Respect for law and treaties will be maintained only in so far as the law recognizes the effective political machinery through which it can itself be modified and superseded" (Carr 1946: 176). Carr's argument is that rigid sets of rules that are not capable of reinterpretation or amendment as the power that supports them waxes and wanes will generate political discord. The basic coherence between the distribution of material power and the "rules and rights" of the system is a linchpin of Gilpin's theory of international governance (Gilpin 1981: 34-37). International lawyers sensitive to power politics make a similar point (e.g., Vagts and Vagts 1979: 555).

[16] The basic idea is that contracts constrain rather than enable, serving as a parameter that can change the way a state orders its preferences – but not change its underlying interests or identity. This operation works through "persistent and connected sets of rules (formal and informal) that prescribe behavioral roles, constrain activity, and shape expectations" (Keohane 1989: 3).

[17] Abbott et al. (2000) develop an analytical framework for understanding contract in the instrumentally rational, unitary, egoistic state. See Guzman (2008) for an illustration of a positive, rational choice international law understanding of how such constraints might operate.

[18] Keohane 1984 and his disciples develop many variations on this basic argument. Some of these approaches are more mixed, combining a logic of consequences and a logic of appropriateness but still focusing on how consent and contract can constrain states. For example, Ikenberry argues that "where rules and principles that spell out the terms on which disputes are to be settled are also agreed upon, this also strengthens expectations about future state behavior. In other words, institutional agreements can create 'process rationality'; an institutional framework is created that specifies the appropriate and expected way in which states will conduct their relations" (Ikenberry 2001: 65).

[19] Simmons 2009: 12

the aggregated interests of the contracting states (Koremonos et al. 2001). A multilateral treaty is a product of the political-legal "market" rather than a result of the influence of any individual state.[20] If the price is right – that is, if the bargain struck offers net utility – states contract in.

On its face, the argument from contract is satisfying in respect of the EEZ regime, in that it accounts for a seemingly cooperative, relatively efficient outcome that accounts for the varied interests of a large number of states. The EEZ establishes some degree of order for an otherwise disorderly situation in which states advanced incompatible claims to extended jurisdiction and clashed over resource rights.[21] That some parties have not fully complied is not problematic in itself if there was some convergence on an agreed norm that permitted a more efficient exercise of jurisdiction to the states that value it most (Posner and Sykes 2010). However, the implication that China ratified the treaty because it was superior to alternatives (in delivering some kind of utility or welfare) strains even the loosest contract framework. As addressed in the subsequent chapter, the configuration of China's geography and the scale of its fishing fleet together ensure that China faces an absolute loss in terms of available fishing grounds. All Chinese EEZ entitlements are truncated by its geography, meaning it gained a smaller zone of exclusive jurisdiction than others; more importantly, its distant water fishing fleet, the largest in the world, was now no longer allowed to operate in the EEZs of other states, radically diminishing the resources directly available to China. Further, the EEZ's generation of extended jurisdiction from islands vastly complicated and expanded the known problem of sovereignty disputes in the South and East China Seas. Perhaps most damaging to this approach, the contracted solution was indeterminate: it did not clearly distribute rights and duties to coastal and user states in EEZs,

[20] Koremenos, Lipson and Snidal 2001 offer an especially clear illustration of this line of reasoning. This microeconomic logic leaves us with a kind of "stork theory" of international law – when states love each other very much and want to maximize their utility, a functional solution will be delivered to them [by a stork].
[21] The "Cod Wars" are the most recognizable of these conflicts. See Jonsson 1982.

and left unanswered critical questions about the conditions under which states were entitled to EEZs (the "island" regime of Article 121 in particular). By assuming common knowledge of the specific constraints a contract imposes, this mode of reasoning fails to account for the substantial interpretive and practical leeway some international legal agreements afford.[22] The contract is, at best, incomplete.

Even if this theoretical edifice is not entirely satisfying, tinkering a bit with some of the parts of the contract analogy yields four helpful insights. (1) Some contracts do not offer any net utility, but states comply nonetheless because the alternatives are even worse. This may be because of coercion, or simply because the costs of an alternative contract or course of action are even higher (Gruber 2000). (2) States may selectively comply with only some functional parts of a contract (i.e., a treaty) because some provisions are more advantageous (or less disadvantageous) than others.[23] (3) Geographically varied non-compliance may occur due to uneven distributions of enforcement power. (4) Incomplete contracting leading to "dueling compliances" is another possibility, whereby incompleteness, incoherence, indeterminacy or ambiguity in the language of the contract creates the institutional possibility and organizes incentives for contracting parties to behave in non-cooperative ways.[24] The conventional wisdom that, in China, "signing the contract is only the beginning of a negotiation"[25] has particular resonance here, as the contracting process

[22] Some scholars point to the prevalence of "soft law" as evidence that such indeterminacy can in fact promote adherence to contracts, a kind of "rational adaptation to uncertainty" about present and future states of the world (Abbott and Snidal 2000: 444). If indeed the indeterminate rules of the EEZ seemed to promote cooperation in a practical sense, this would be a profitable line of inquiry. It is further undercut by the fact that the UNCLOS III treaty is very clearly "hard law" imposing definite obligations and adjudication procedures.

[23] There are many possibilities for how this would work: Some non-compliance can escape detection or avoid punishment sufficient to disincentivize the action. Sometimes this selective compliance is a function of different sub-state actors with different assessments of the utility of various provisions.

[24] See, for example, Jonsson and Tallberg 1998: 928–940, who explore how 'contracts' evolve through strategic behavior even after agreements are finalized.

[25] The author heard versions of this statement from dozens of interlocutors during fieldwork in China in 2012, and 2014-2015. Several law professors also cited the same unverifiable claim that only 30% of contracts signed in China are faithfully executed.

may be protracted over a long period over which parties test and manipulate the *de facto* meaning of a given agreement as it is implemented in practice.

Norms: Transformative influence. Norms that constitute the international legal system can transform the identities and interests of states (or rather, the organizations and people composing them).[26] By virtue of participating in a political order in which international law is a common institution (Bull 1977), certain "reasons for action"[27] are created that would not otherwise exist (Kratochwil 1989). The existence of a norm can make certain actions conceivable (like administering an EEZ) and create new categories of action (like passing laws on the EEZ) that would not otherwise have been appropriate or meaningful.[28] International law may then influence not only the consequences states face for certain behaviors, but also influence states' beliefs about what is an appropriate way to act in their self-interest.[29] That judgment of appropriate behavior is largely a function of a state's identity – a self-image, held by individuals representing a state, that the state has such-and-such interests and values and such-and-such modes of conducting itself in international affairs. In short, identities prefigure interests;[30] both may change as a function of the social environment in which the actors operate (Klotz 1995). This influence operates through intersubjective knowledge among relevant actors of appropriate

[26] The idea of a transformative role for norms overlaps significantly with the idea of a "constitutive" role, and the two may be used interchangeably for purposes of general discussion (Searle 1969, 1995; Katzenstein 1996).
[27] See also Ruggie 1998.
[28] Elster 1989, Kratochwil 1989, Chayes and Chayes 1993, Katzenstein 1996, and Ruggie 1998, among others, develop this logic. Norms may operate as "reasons for action" as distinguished from "causes for action" (Ruggie 1998: 869). One way to understand this distinction is to assume that "social norms provide an important kind of motivation for action that is irreducible to rationality or indeed to any other form of optimizing mechanism" (Elster 1989: 15).
[29] The basic difference between a norm- and an interest-oriented style of reasoning is the claim that states act on the basis of a "logic of appropriateness" (March and Olsen 1998: 949-954). This is especially so when these norms are a product of new circumstances and thus create new incentives – that is, constitute new rules of the game. Such "constitutive rules do not merely regulate, they create or define new forms of behaviour…Regulative rules regulate a pre-existing activity, an activity whose existence is logically independent of the rules. Constitutive rules constitute (and also regulate) an activity the existence of which is logically independent of the rules" (Searle 1969: 33-34).
[30] The generic claim is that norms "constitute social identities and give national interests their content and meaning" (Adler 2013: 126).

norms, which may be diffused in varied social-institutional environments through networks of expert or scientific communities, diplomatic corps, and other non-state actors.

Because the argument from norms does not entail any general prediction about what international law "does," it does not necessarily mischaracterize China's relationship to the law of the sea. However, the thrust of the norms research agenda has been towards demonstrating the salutary effects of international law, focusing on the diffusion of norms concerning free trade, human rights, the environment, laws of war, and arms control to the exclusion of stories about the failure of norms to properly take root, or the diffusion of "bad" or amoral norms.[31] A sort of selection bias is evident in this scholarship, in which the favored subjects of research tend to be liberal norms valued for ethical reasons.[32] Even cursory familiarity with the story of China and the law of the sea is sufficient to recognize that no such cooperative tendency is afoot. Even if we assume, as contractualists do, the underlying determinacy and coherence of the norms, there is strong evidence in this case at least that China's practices diverge substantially from those of other states. Indeed, states do not always "learn" the same things from the same social environments, and may in fact distance or dissociate themselves from the norms purveyed in international legal regimes.[33] Socialization is not always a homogenizing process. Norms may be

[31] A notable exception is Evangelista and Shue (eds) 2014, which explores aerial bombardment without pressing a narrative of norms always changing in a more progressive, humane, or desirable direction.

[32] The field is not quite this uniform, and many authors carve out exceptions for non-liberal states. For example, Beth Simmons notes the existence of "strategic ratifiers" – states that exploit membership in human rights regimes for reputational effects, but fail to honor their obligations (Simmons 2009: 58-59). Nonetheless, these "false positives" are relegated to peripheral roles in analysis that develops the causal pathways through which norms properly take root. At any rate, the norms associated with the EEZ have no meaningful ethical content (with the exception of environmental protection, perhaps), and are thus less easily evaluated on substantive grounds (is 200nm better than 100nm?) than they are on procedural grounds (do the regime's norms become a part of general state practice?).

[33] "The meaning of norms can…be 'de-linked' or 'decoupled' from their original purposes; even as they maintain legitimacy through the connection to an internationally accepted institution, people's interpretations will vary depending on political, social and cultural context" (Leheny 2006: 12-13). Other authors explore the logic of "decoupling" with considerable rigor, noting that "spurious forms of compliance" (Goodman and Jinks 2013: 30) are more prevalent than conventional models typically allow. They argue that there is significant theoretical space

interpreted and practiced in various ways, a possibility that the standard approach from norms does not so much foreclose as underemphasize.

The following four second-order norm-based alternatives for how a state might be influenced by international law have bearing on our case: (1) Retrograde motion toward rejection of all or part of international legal obligation: a state's engagement with international law may lead it not to learn that "all law is good" but rather to the belief that "some law is good and some is bad." A state's representatives may conclude that (at least partial) non-participation in the system, however materially costly, is in the national interest because international law is illegitimate. (2) Opportunistic use of international law as an instrument of policy: the normative "lesson" may not be interpreted or internalized in pro-social ways, leading the state to use the law contrary or orthogonal to the "intent and purpose" of the original norms. (3) Law as justification for new practices: interpretations of the law, especially new law, may create new reasons for action. A state may acquire new legal rights, or revise its understanding of existing rights, and will then act accordingly to secure those rights. The processes by which those rights are recognized and acted upon will depend on the state's domestic legal organization to incorporate international norms and rules, and will be shaped by more general attitudes toward international law, informed by the state's identity as a state who accepts, rejects, values, or devalues international law. Such practices may not be uniform from state to state, varying according to sub-state variables like the type and character of the state's legal and political institutions. Finally, (4) norms are not static: there is substantial scope for actor agency in *changing* existing norms or *creating* new norms.[34]

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and empirical evidence for major disjunctures, or decoupling, between formal treaty commitments and practice (Goodman and Jinks 2013: 135-165).

[34] Kratochwil explains this reciprocal action: "Actors are not only programmed by rules and norms, but they reproduce and change by their practice the normative structures by which they are able to act, share meanings, communicate intentions, criticize claims, and justify choices. Thus, one of the most important sources of change,

The role for individual or state agency in the law-making process is especially relevant when considering the advent of an entirely new regime, like the EEZ, and the participation of a novice actor, like the PRC.

Power, Contract, and Norms: Insufficient but Necessary Parts of an Explanation

How do power, contract and norms come into play in the specific domain of China's relationship to the EEZ regime? Do we see a prevalent pattern of international law failing to constrain strong actors (with law epiphenomenal to power), of it meaningfully constraining them in particular settings (through contract), or transforming the political arena and the participants themselves, thereby creating new reasons for action (through norms)? Must we choose between them? If law is operating according to each in greater or lesser degree, as seems likely, the payoff lies in determining when, where, and how that operation takes place in the case under inquiry. Basic familiarity with the EEZ regime and China's maritime disputes immediately demonstrates the limits of any fully orthodox approach from power, contract or norms. Each suffers from some major defects in explaining even the basic outlines of the story of China and the EEZ. Yet the second-order implications that can be derived from each theoretical approach are instructive, and should be woven into the analysis. Each at least tacitly admits of the possibility for transformative change – both to the states and actors interacting with international law, and the rules and norms constituting international legal institutions.

The argument from power functions very differently when the interests of powerful states are not the basis of "the rules." The expectation that those rules, untethered from power, should not have direct influence on those states is probably a sound one, but it does not rule out the possibility

neglected in the present regime literature, is the practice of the actors themselves and its concomitant process of interstitial law-making in the international arena" (Kratochwil 1989: 61).

that the law may enable weaker states who would otherwise be constrained by it in a functional international legal system underwritten by the power and interests of strong states. "No constraint" is not the same as "no influence," though the two are often conflated. The strict contract argument, meanwhile, is perhaps most helpful in identifying what the EEZ regime is *not*: a determinate, efficient solution to a problem. It obscures the wide variety of ways the rules might be interpreted. In the absence of a mechanism – in the form of a powerful state or states, or agreed procedure, or the overwhelming superiority (or efficiency) of one particular solution – that could force convergence on any one particular interpretation of the norms of the regime, we are obliged to inquire into other processes in play. Attention to norms likewise seems necessary, but insufficient without broadening the aperture to include the diversity of norms and the range of outcomes from their diffusion. Studies of norms need not be limited to "cooperative" empirical phenomena. Transformation of state interests by norms – and of norms, by state practices – can lead to more disagreement, depending on the actors and the norms in question.

Considering these various explanations in concert, it is evident that the influence of law is likely far more complex and practically meaningful than can be represented by reference solely to "constraint" or "no constraint." Practice can and should be described in richer terms than compliance and non-compliance (Kingsbury 1997). Full appreciation for the constitutive role of norms operating in complex social environments allows a more nuanced, if less parsimonious, account of regimes like the EEZ to emerge as the historically unique products of patterned state practice.[35] To realize these insights, we turn to international law scholarship of recent decades, which offers some powerful insights into the process of international law-making through international legal practice.

[35] For thorough exposition of this idea, see Reus Smit 2004: 18-20.

II. Ocean Politics Through a Legal Lens

Certain strands of international legal theory provide the basis of a broad analytical construct that can accommodate those various theoretical propositions from IR and apply them productively to examine China's relationship with the EEZ. Most applicable are social science-informed approaches that transcend the international lawyer's abiding professional concern with compliance – what practices "count" as compliant and how they should be encouraged – to deal with the broader questions of how international law relates to international political order. This section first observes the liberal presumptions baked into international law scholarship, then moves to critique a particularly influential articulation of an implicitly liberal theory (Harold Hongjuh Koh's theory of transnational legal process). This critique yields a novel way to fold power, contract, and norms into the study, while retaining lawyerly attention to the specific substantive and procedural qualities of the norms under inquiry.

International Law's Liberal Bias

Disentangling the normative aim to promote compliance from the analytical aim to explain the actual qualities of state practices is a challenging task for legal scholars trained in Western jurisprudence. With the important exception of radical approaches in critical legal studies (Kennedy 1988; Koskenniemi 1989; Purvis 1991), the legal discipline and profession at least implicitly value a profoundly liberal concept of the rule of law as the default mode of domestic and international politics. By introducing some of the more complex and explicitly political possibilities envisaged in IR, we can head off this bias and develop a working theory that admits

a possibility that the "progressive development" of the law of the sea[36] may well make its "progress" along an alternative track.

In the legal field, the "majority opinion," as it were, seems to be that international law is on balance a modernizing force for backward countries, a vector for universalistic liberal values (with largely Western origins and championed by western publicists) that will promote greater domestic and global harmony. One of the most influential spokespeople for this view, Anne-Marie Slaughter writes with a coauthor that "[i]nternational legal rules and institutions can enhance the capacity and effectiveness of domestic institutions. If properly designed and structured they can help backstop domestic political and legal groups trying to comply with international legal obligations."[37] This "liberal internationalist model"[38] of international law does not argue that all states inevitably fold into the liberal order, but it does make a strong normative claim about the superiority of the "zone of law" (in which international law takes effect in domestic legal systems) over the "zone of politics" in which legal obligations have no special salience, and are honored only where expedient.[39] Western international lawyers argue that drawing illiberal states like China into the "zone of law" is among the basic purposes of legal regimes like the law of the sea.[40]

International relations scholars advance a variety of arguments for why liberal norms should be considered the default in international politics (Keohane 1984, Doyle 1986, Fukuyama 1992,

[36] "Progressive development" is among the overarching aims of UNCLOS III, announced in its Preamble and firmly ensconced as an important goal of professionals working on the law of the sea.
[37] Slaughter and Burke-White 2006: 333
[38] Burley 1992: 1909
[39] "Within the liberal zone of law, the price of a general rule of recognition and enforcement of foreign law is the submission of the specific law in question to some form of minimal review for consistency with fundamental public policy and congruence with the balance of competing national interests. In the zone of politics between liberal and nonliberal states, by contrast, political considerations are expected to dominate the dispute resolution process" (Burley 1992: 1911).
[40] Comments by Harold Koh, Columbia Law School (1 November 2012).

Ikenberry 2000). In large part, they prevail in the contemporary international system due to the gradual establishment of Western-dominated global institutions for trade, investment, security, human rights, and so on. These institutions bind the leading states in the system and offer "voice opportunities" to weaker states that invest them in the system and make it superior to "exit" to an insecure and unprosperous world (Ikenberry 1998/1999, 2000). Theoretically, this ascendant liberalism is subject to change with changing distributions of power, but the robustness of these institutions and their efficiency relative to plausible alternatives make such changes less likely (Keohane 1984). Without announcing any normative preference for liberalism, this school contends that, descriptively, American (and Western) power is perpetuated in the form of binding institutions that enshrine liberal norms, even after that power is no longer sufficient to enforce those norms. International law is the most tangible manifestation of this institutionalized post-World War II arrangement, establishing a process of international political decision-making with wide legitimacy, and that is superior to all conceivable alternatives.[41]

The rise of China[42] poses a particular challenge to this fairly dominant approach to contemporary international relations. Its proponents are now mounting a concerted rear-guard action to shore up the resilience of this system, in part by relying on fever-finer distinctions about the liberal character of the supposedly prevailing world order. In the face of a distribution of power that does not give America untrammeled freedom of action and capacity to unilaterally set and enforce "the rules," leading scholars like Ikenberry pronounce the robustness of the basic liberal

[41] Ikenberry has been one of the clearest and most influential proponents of this claim that the opportunity costs of unseating the "liberal world order" are prohibitively high. He has argued for twenty years, even in light of the rise of China and other developing states, that "alternatives to an open and rule-based order have yet to crystallize" (Ikenberry 2011a: 58). More recently, he has conceded the profound challenge to this system presented by China and Russia, but maintains that the system will remain intact because it brings together such a broad coalition of states acting in concert on the basis of their self interest: "…even if China and Russia do attempt to contest the basic terms of the current global order, the adventure will be daunting and self-defeating" (Ikenberry 2014: 89).

[42] China's rise, as well as that the "BRICS" states, supports the widely shared view that America's unipolar moment is vanishing, or has vanished.

compact embedded in the system: "…to the extent that their demands on the system are primarily about the distribution of authority and rights, and not about the underlying principles of liberal order as such, it will be more likely that new bargains and agreements can be reached that preserve the basic framework of the existing system."[43] Now, even as certain privileges and advantages erode, the formerly dominant Western states should remain confident that the fundamentally liberal character of global order remains intact because there is not (yet) a coherent substitute for it.[44]

This conceit of liberal ascendancy is not limited to self-professed liberals. Indeed, regardless of theoretical stripes, there is a tacit presumption that liberal norms predominate and will continue to do so. The empirical record of the last decades seems to support the liberal thesis, even for those not inclined to accept it on theoretical grounds. Many international lawyers visit the church of Morgenthau to chant their profound skepticism about international law's independent power (Goldsmith and Posner 2006). Yet in so doing, these scholars effectively predict liberal outcomes. This is not because of the superior efficiency or utility of those norms, but rather due to their powerful proponents: if power determines law, powerful liberal states will create liberal laws. The United States, Europe, Japan, and their various allies and like-minded partners have long enjoyed a favorable balance in the international distribution of power and consequently determine the relevant "rules and rights" of the system.[45] The global market economy and accompanying legal institutions that have emerged in the post-war era reflect their interests: they promote liberal norms.

[43] Ikenberry 2011b: 282
[44] "[A]s this hegemonic organization of the liberal international order starts to change, the hierarchical aspects are fading while the liberal aspects persist. So even as China and other rising states try to contest US leadership – and there is indeed a struggle over the rights, privileges, and responsibilities of the leading states within the system – the deeper international order remains intact" (Ikenberry 2011a: 61).
[45] Gilpin 1981: 30

Meanwhile, despite no necessary analytical bias towards liberalism, empirical arguments based on norms are inexorably drawn to study the diffusion of liberal norms. After all, they are the predominant stock of norms in the contemporary system, and the ones most highly prized and promoted by powerful states, multinational firms, and even high-minded "norms entrepreneurs." The norms associated with the law of the sea were once profoundly liberal, so this bias is quite appropriate for an earlier era in which *mare liberum* was the uncontested, perhaps even peremptory norm of the maritime domain.[46]

However, this bias should now be inverted: the stock of norms embodied in UNCLOS III marks a profound departure from that liberal doctrine of freedom of the seas. In assigning coastal state control to vast expanses of maritime space that were once unregulated high seas, the new regime established norms that inevitably infringe upon formerly-enjoyed liberal freedoms.[47] The EEZ, in particular, grants jurisdiction and rights to the coastal state on the basis of geography – not on the basis of the liberal principle that the market will determine access and use on a first-come-first-serve basis (Krasner 1985).[48] These new norms are decidedly not akin to those of the human rights and free trade, which tend to reduce the state's exclusive control over many domains of activity; instead, they are "control" norms that open the door to considerable state discretion for those polities inclined to pick up this new instrument and use it for political purposes. Recognition of the qualities of these new norms undermines some of the substantive claims of

[46] Lapidoth 1975: 259. Peremptory, or *jus cogens* norms are those from which no derogation is possible, and will override other norms where there is conflict between them.

[47] Analyzing the various functional areas now regulated by coastal states in EEZs – fisheries, commercial and tanker traffic, military activities, and maritime security – a prominent law of the sea scholar concludes that it "is clear that it is no longer accurate to say that the freedom of navigation exists in the exclusive economic zone….The balance between navigation and other national interests continues to develop, and navigational freedoms appear to be disappearing during this evolutionary process" (Van Dyke 2005: 121).

[48] Krasner develops this argument at length in his case study of the law of the sea in the suggestively-titled *Structural Conflict: Third World Against Global Liberalism,* charging that new norms of "authoritative allocation" under such regimes undercuts the liberal operation of a "market-oriented regime" in which "allocation is a function of the resources and preferences [i.e., power and interests] of individual actors" (Krasner 1985: 297).

liberal-minded theorists, but opens the door to understand how the same processes that promote liberal norms might also lead to the "progressive development" of a more closed law of the sea.

Such a decay or dysfunction of liberal norms in international law and politics is neither anomalous nor unexpected. The fragility of post-war institutions upholding the purportedly liberal world order has been a periodic obsession of the IR discipline at least since the 1970s. Even in the triumphal moments of post-Soviet collapse, the impermanence of that triumph was always implicit. Reminders of liberal norms' vulnerability to structural changes, evolving ideologies, and exogenous shocks are ever more urgent in the coming era of Trump, Brexit, and the powerful backlash against the very globalization that nurtured and distributed liberalism wherever markets took it. If the purpose backing Western power is no longer committed to upholding this order, there is growing potential for China and others to drive transformative change.

The Promise and Peril of Transnational Legal Process

Process-oriented IL scholarship offers an ideal vehicle for exploring this increasingly real eventuality of non-liberal developments in international law. Proponents of this move aim to transcend the false binary between the "zone of law" and the "zone of politics" by adopting a more self-consciously social mode of inquiry that recognizes the interrelationship of those arenas.[49] Particularly notable in this vein is the "New Haven School" of policy-oriented jurisprudence, which treats international law as a "process of authoritative and controlling decision" (Lasswell and McDougal 1992). It is explicitly social-scientific in its aim to consider international law as a product of social activity, and to analyze it systematically by drawing on

[49] For a review of this literature, see Koh 1997: 2618-2624

observations beyond the traditional "positive" sources of international law. This heavily normative (and famously unwieldy)[50] framework aims to help legal scholars make determinations about what the law should be for the sake of human dignity (Lasswell and McDougal 1992; Reisman 1993). In so doing, it backs into the same liberal presumptions that seem so peculiarly inapt for the case at hand. Even if "human dignity" appears unobjectionable and universalistic at first blush, in the breach it merely provides a normative excuse for international legal decisions and policies favored by the liberal west.[51]

Still, the New Haven school's deliberate focus on process and close attention to concrete practices rather than abstract rules is a valuable corrective, and worth exploring as a vehicle for analyzing the contemporary international politics of the EEZ without some of the normative baggage. Stripped of its Cold War baggage and revitalized by a heavy dose of contemporary IR and sociology, the New Haven school has enjoyed a modern renaissance in the form of "transnational legal process" theory (TLP). This theory's principle advocate and practitioner, Harold Hongjuh Koh,[52] honors the school's origins in New Haven and American legal realism by eschewing legal formalism for a more social, policy-oriented approach that embraces the multiplicity of actors, forums, and norms that constitute the contemporary international legal

[50] Fitzmaurice 1971: 360-367

[51] Critical legal scholars argue that New Haven school practitioners derive these values from human rights treaty instruments as proxies for "community" or "universal" norms, and therefore end up promoting [U.S.] policy rather than offering a normative guide for practice (Koskenniemi 1989: 204-207). The tension between economic rights to development at a state level and individual rights is an especially clear area where this framework becomes contentious.

[52] Currently professor at the Yale Law School, Koh was the U.S. State Department Legal Adviser from 2009-2013 and U.S. Assistant Secretary of State for Democracy, Human Rights and Labor from 1998-2001.

order. The central problematique for this school is the question of obedience, or as Thomas Franck memorably has it: "why do powerful states follow powerless rules?"[53]

TLP resembles sociologically-oriented IR in recognizing that law becomes meaningful only in the "interplay between [legal] rules and social processes"[54] that operate outside, inside and in between states. It borrows IR's attention to the transnational arena, and is similarly motivated by the historically- and empirically-informed judgment that "the jurisdiction and agendas of states are increasingly worked out within a transnational context."[55] There is no presumption of states as unitary actors, representing the sole agents of public international law. Unlike deliberately apolitical conventional theories of law, TLP does not impose analytical strictures that demand formal, "legalistic" reasoning according only to positive law, existing and operating independent of politics. Instead, the TLP approach conceives the two as mutually constitutive, accommodating a norm-conscious IR lens that sees the "politics within law, the idea that law can be constitutive of politics, that politics may take a distinctive form when conducted within the realm of legal reasoning and practice."[56] Contestation and practice of international law is a significant part of international politics; meanwhile, international politics are shaped in myriad, often profound, ways by the particular constellations of rules and norms produced by the international legal system and their implementation by states and sub-state agents. In this rendering, politics and international law have a reciprocal relationship; they cannot be addressed in isolation without considerable distortion.

[53] Franck 1990: 3. See Yale Journal of International Law, Vol. 32, No. 2 (Summer 2007) for a symposium on the subject of the "New" New Haven School of international law.
[54] Koh 1997: 2618
[55] Jepperson, Wendt and Katzenstein 1996: 48
[56] Reus-Smit 2004: 14

Koh focuses on legal encounters among actors including states, organizations and individuals, a recursive pattern of activity which "feeds back to modify domestic law, reshape domestic bureaucracies, and change the attitudes of domestic decisionmakers" such that they are more likely to obey the law "out of perceived self-interest."[57] The theory posits that such obedience comes about through linked processes of *interaction, interpretation,* and *internalization.*[58] The transnational legal process theory "predicts that nations will come into compliance with international norms if transnational legal processes are aggressively triggered by other transnational actors in a way that forces interaction in forums capable of generating norms, followed by norm internalization. This process of interaction and internalization in turn leads a national government to engage in new modes of interest-recognition and identity-formation in a way that eventually leads the nation-state back into compliance."[59]

For our purposes, the main promise of the theory lies in its dynamic model of how law functions in between and inside states. It recognizes not merely horizontal relationships among unitary, sovereign states, but also the vertical relationships among diverse actors within states, and their multifaceted intercourse with one another. This transnational frame enables a richer and more satisfying analysis of law's influence on China's interests and identity (and vice versa), recognizing the role of diplomats representing China in its interactions, the political and scholarly elites who interpret the law of the sea, the legislators and bureaucrats drafting and enacting PRC maritime law, and the various sub-state agencies carrying out China's practices in

[57] Koh 1997: 2655, 2622
[58] Koh's thesis is developed over the course of several articles, including Koh 1991: 2347, 2398-2402; Koh 1994a: 2391, 2405-09; Koh 1994b: 999; Koh 1996: 194-206; Koh 1997: 2645-2659; Koh 1998: 627-679. Others, notably Shaffer 2012, have developed TLP as a practical tool for anticipating the effectiveness of international legal rules and norms.
[59] Koh 1996: 206

the EEZ. With some adaptation, this transnational legal process model offers an ideal fit for the problem at hand.

III. Beyond Obedience: Adapting Transnational Legal Process to China and the EEZ

To adapt TLP for the purpose of framing a study of how China and the EEZ regime influence one another, four aspects of the model must be reconsidered: (1) the teleology of "obedience" to law must be discarded; (2) the process of internalization and obedience are not directly linked, so an intervening process of *implementation* should be conceptualized to account for divergent practices and outcomes; (3) the model must also be tailored to address the distinctive properties of non-liberal legal and political institutions, like the PRC's; and (4) the indeterminacy of key norms must figure into our expectations of how laws will be internalized into a state's domestic legal institutions and implemented in practice.

(1) Teleology of obedience. Koh's theory wears its hopeful teleology on its sleeve. He argues that "[b]y domesticating international rules, transnational legal process can spur internal acceptance even of previously taboo political principles. The process usually occurs in four phases: interaction, interpretation, internalization *and obedience.*"[60] The last of these phases is not descriptive but prescriptive, and summarily neglects a host of other possible. This "best of all possible worlds" template insists that every story eventually comes to a cheerful, Panglossian end by virtue of a transnational legal process that will transmit exactly the norms intended. The basic idea is that people just need to participate in the transnational legal process for long enough

[60] Koh 1998: 644, italics added

and eventually they will learn to love (liberal) norms – and not just because they are incentivized to comply for the sake of material or psychic rewards, but because they genuinely want to.[61]

The reasons for discarding this teleology of obedience are not just analytical. The triumph of law over politics presumed in Koh's model is actually not so much a theoretical prediction as a normative "plan of strategic action for prodding nations to obey [the law]."[62] Speaking on China's maritime conduct in particular, Koh advocates drawing PRC conduct "out of the zone of politics and into the zone of law."[63] This is not an objectionable aim when the norms and rules in question enact prohibitions on torture or slavery, for which momentous historical and normative changes are quite evident and welcome (if incomplete). The moral force of the EEZ regime, by contrast, is negligible, and need not be promoted for normative reasons. For the most part, it is a regime that coordinates and assigns state jurisdiction for the sake of efficiency (Posner and Sykes 2010), not justice, and should not be considered to have a very significant ethical dimension.

This tendency to moralize the rules reflects a common political preference among foreign experts, especially when it comes to "socializing" China to be a "responsible stakeholder."[64] Whatever its ethical merits, it is not one suited the empirical study of political contestation over rules of law. This study will therefore intentionally transgress and elide the boundaries between these "zones." I prefer to make no assumptions about where politics begins and ends, nor do I

[61] Koh argues that "moral, normative, and legal reasons are in fact conjoined in the concept of obedience. A transnational actor's moral obligation to obey an international norm becomes an internally binding domestic legal obligation when that norm has been interpreted and internalized into its domestic legal system." (Koh 1997: 2659). Johnston 2008 uses the concept of "social influence," and Goodman and Jinks 2013 use "socialization" to explain this phenomenon, identifying shifts in actors' perceived costs and benefits created by social rewards or censure ("back-patting" or "opprobrium" in Johnston 2008). When the social process appears to redefine the actor's utility function (rather than just shifting it up or down with incentives that do not modify underlying interests), these and other sociologically-oriented models focus on phenomena of persuasion and learning.

[62] Koh 1997: 2655

[63] Harold Koh remarks at Columbia Law School (November 1, 2011).

[64] This is the felicitous phrase of former U.S. Deputy Secretary of State Robert Zoellick, who was among the key proponents of the notion that China's participation in international legal institutions is, on balance, a desirable American foreign policy objective.

assume that obedience with the rules (however defined) is a necessary – or even necessarily a desirable outcome. Further, we need not assume that states "obey" the EEZ in a manner consistent with the purposes of those who developed the regime.

Instead of presupposing the congruity between the original norm and its eventual practice, TLP can be revised to admit for the possibility of international law being distorted, abridged, or omitted as it is internalized into a state's domestic laws, sometimes decoupled from the function and purpose of the original norm as the state implements the rule in practice. "Obedience" to a rule is only one of several possible outcomes of the transnational legal process.

(2) *Beyond internalization.* Such alternatives can be more fully explored by replacing the "obedience" phase with a descriptive *implementation* process after internalization. In doing so, we eliminate the teleological faith in converging practices and recognize the many directions that participation in transnational legal processes may lead. Koh's theory, like that of many practicing international lawyers, ends with the state adopting compliant laws that will then become policy through stable, institutionalized processes. These processes produce a recognizable script for regulatory, executive, and judicial organs to put obedient policy in to practice. His ultimate concern is with internalized obedience to those rules, but his conception of internalization is too narrowly scoped to appreciate polities in which law on the books is peripheral to observed decision-making and practice. Ending with internalization may be highly practical when human rights norms and rules are the object of study (and advocacy): the whole point is for the state to change the rights it bestows on its own citizens, which they can then enforce against the state through courts and other institutionalized oversight processes. But in a state without a robust rule of law, like China, the transnational legal process lives on as the norm circulates throughout the

state. We will not understand its influence without taking a further step to explore its *implementation* in systematic terms.[65]

After all, Koh is not just proposing ad hoc obedience, but rather, the progressive transformation "from one-time grudging compliance with an external norm to habitual internalized obedience."[66] The implied multiple rounds of interaction in global law-making forums involve states that, having internalized the norms and rules in question, will eventually externalize them in a transnational setting. For them to be externalized, the norms must find their way into the practices of the various agents of the state who implement the new rules instilled by interaction, interpretation, and internalization of international law.

This stage is necessary for any explanation of how there were even norms to be internalized in the first place: states must have put them into practice in the international arena for there to be any cause for cooperation in the form of treaty-making. In including implementation, we address the actual practices that must ensue for obedience – or any other outcome – to take root. This move also opens the door for analysis of how a state's practices can influence the original norm or rule. We ought not seek to explain why all roads lead to "obedience" when that is not the only endgame, and in any event, becomes meaningful only to the extent it is put into practice. We need to incorporate the implementation process to account for these practices.

(3) *Adapted to China's party-state political system.* A further modification concerns the types of

[65] Koh does nod to the iterated nature of the transnational legal processes under inquiry, but does not extend his analysis to consider alternative pathways of "progress": "[f]rom this process of interaction, new rules of law emerge, which are interpreted, internalized, and enforced, thus beginning the process all over again….[TLP] focuses not simply upon how international interaction among transnational actors shapes law, but also on how law shapes and guides future interactions: in short, how law influences why nations obey" (Koh 1996: 184). This appreciation of continuity in process, however, does not extend to his analysis, which tends to see internalization as equivalent to obedience. It is the underspecification of the internalization process, then, that this intervention seeks to treat.
[66] Koh 1997: 2655

agents, institutions and norms involved in transnational legal processes, especially interpretation and internalization. The particular qualities of China's domestic legal and political institutions need to be reckoned with for TLP to adequately deal with the case of China and the EEZ. Specifically, the model must account for the absence of independent transnational actors and groups typically cited as influencing state-level decisionmaking; even more important from a process standpoint, the model must be amended to address the lack of institutionalized, legal mechanisms for voicing independent preferences, even from actors within the state itself.

Koh's theory depends heavily on a vigorous role for diverse actors empowered by domestic legal institutions. There is an assumption that some type of independent power resides in courts, lawyers inside and outside government, legislators, regulatory agencies, and civil society actors (e.g., transnational norm entrepreneurs, non-governmental organizations, media, activists). Their participation in the transnational legal process does most of the heavy lifting in the theory. However, these diverse stakeholders are unlikely to be significant factors in transnational legal processes in illiberal states without rule of law. Perhaps even more so than other illiberal and authoritarian states, China has virtually no legal and judicial checks on exercise of centralized political power by the Chinese Communist Party (CCP). The PRC legislature, while producing ever-greater quantities of black letter law, tends only to rubber-stamp CCP decisions, and exercises no formal or informal check on executive prerogatives. The CCP dominates the government, controlling appointments to all of the key government positions and dictating the state's policy goals through political officers embedded at every level of governance.

Further, China's laws are not easily or directly influenced by its weak, muted and disorganized civil society. To the extent such non-state groups exist, they are unable to directly or

meaningfully exercise voice in the political-legal processes of the contemporary PRC. All decision-making about treaty ratification and implementation takes place among CCP elites and is then presented to bureaucrats as a script for administration, never entering the public arena as a subject for wider debate. So in China, where political elites dominate the lawmaking and policy process to the near-total exclusion of civil society and courts, we must tailor our view of what types of transnational legal processes are even plausible. Any international norms reflected in PRC law depend heavily on the particular configuration of power within the Chinese party-state.

Koh anticipated this generic dissent about the way norms function within illiberal states, and argues that the effectiveness of TLP (i.e., its tendency to produce obedience) depends more on the qualities of the "particular rule for which internalization is sought," not the legal and political system in question.[67] Conveniently, he cites "rules regarding the law of the sea" among those that are "routinely internalized."[68] He further argues that the "nature and permeability of the domestic legal system as a whole"[69] (*i.e.*, the degree to which it is liberal) is not as important as the degree of internalization of a particular set of norms. In the Chinese case, as perhaps in other non-liberal legal orders, there is in fact a remarkably high degree of internalization. The lack of checks, balances, oversight, public input, and many other "inefficient" features characteristic of rule-of-law systems are absent, allowing the party-state elite to act swiftly and decisively to promulgate laws that correspond to treaty obligations. The issue worth considering, then, is not the degree of internalization, then, but rather the *type*. Determinations of which norms will survive the internalization process, and in which form, and for which purposes are the exclusive

[67] Koh 1998: 623. He later explains that "...the key determinant of whether nations obey particular rules is not so much the nature and permeability of the domestic legal system as a whole, but rather the degree to which particular rules are or are not internalized into the domestic legal structure" (Koh 1998: 675).
[68] *Ibid.*, 623
[69] *Ibid.*, 675

domain of political, rather than legal, judicial, or legislative, elite.

Koh also recognizes that internalization may indeed be more readily achieved in non-liberal states by virtue of strong executive powers, unhindered by judicial and legislative meddling. He views this as a potentially positive feature, citing the possibility that the executive may then effectively force agencies "to adopt default rules that avoid routine noncompliance with the international rule" which ultimately "should have a liberalizing impact, even upon states that have proven relatively impervious to external influence."[70] He even uses the case of China and the International Covenant on Civil and Political Rights as a plausibility probe for this argument:

> Once Chinese executive officials have agreed to accept those norms, however grudgingly, the transnational process forces described earlier will begin to put pressure upon China – with the assistance of both governmental and nongovernmental actors – in various international fora to comply with various norms associated with that treaty. China's domestic institutions will have an incentive to adopt default rules that avoid routine noncompliance with the international rule. As international sanctions begin to attach to those norms, a process of vertical internalization will predictably commence, however slowly. Thus, over time, acceptance of the international rule should have a liberalizing impact, even upon states that have proven relatively impervious to external influence.[71]

He sustains this argument only by wishing away the party-state's centralized authority, and assuming that a concern for efficiency and discomfort with non-compliance will win out. Such assumptions may be valid as a starting point for reasoning about transnational legal processes in the United States, which may well be a good working model for processes in other liberal states. Tellingly, he uses the United States' grudging acceptance of the 12nm territorial sea rule codified in UNCLOS III as another plausibility probe. In this story, the emergence of a customary norm at odds with U.S. practice and the principled advocacy of sub-state actors (in the military, coast guard, fishing and oil industry interests, and legal advisers in the executive branch) eventually

[70] *Ibid.*, 676
[71] *Ibid.*

led to an executive order to adopt the 12nm rule.[72] This thorough application of a liberal mode of reasoning – whereby the aggregated interests of actors in society constitute the preferences of the state (Moravksic 1997) – is indeed plausible and empirically observable in the U.S. system, but begs the question of whether it is *only* plausible and empirically observable in such a system.

There is no doubt that the distribution of preferences among domestic actors inform decisions undertaken in the highest reaches of the CCP. Still, the PRC's centralized, closed-door process is not akin to the decentralized public policy process in a liberal state like the United States. At a minimum, Chinese leaders are willing and ready to silence non-conforming voices once policies have been deliberated and chosen.[73] Still, Koh's approach is instructive. The actors depicted in the plausibility probe of the U.S. do in fact resemble those who have been most visible and influential in the Chinese engagement with the EEZ regime: central Party-state elites, the navy, and maritime law enforcement agencies. Despite differences in regime-type, the essentially functional, non-normative nature of the EEZ regime[74] makes it amenable to an approach which can see the push and pull of diverse actors who advocate particular laws and policies on the basis of "where they sit" (Allison 1971). We must be more modest, however, about the plausible scope of their influence. China's legal system functions as one of several channels for administering policy (Lampton and Lieberthal 1992; Lubman 1999; Gallagher and Woo 2011) rather than the overarching framework in which political processes play out. There are no legal checks constraining the executive's freedom of action.[75] So, while Koh's theory gives us a wide lens to

[72] Koh 1998: 636-641
[73] The field of Chinese politics struggles continuously to make sense of policy outputs in a system marked by massive lack of transparency and centralized authority. The "fragmented authoritarianism" model developed by Lieberthal and Oksenberg 1988 is one such effort, and various modifications of the thesis (that below the highly efficacious but limited central level, there is significant fragmentation) remains influential among contemporary China specialists (e.g., Downs 2004; Mertha 2009).
[74] In that it principally assigns rights and duties in uninhabited ocean space.
[75] This relationship between legal institutions and the political process in the PRC is explored at length in Chapter 4.

capture all relevant actors, his account is overly optimistic about the governance and regulatory capacity of authoritarian states with weak rule of law, and thus only partially applicable.

The upshot for the model is a need to truncate and streamline the generic internalization process. Koh lays out three complementary mechanisms of internalization: social, judicial, and political.[76] We can restrict analysis only to the latter mechanism. Strict repression of domestic organizations not sanctioned by the Chinese Communist Party (CCP), rigorous filtering of information from abroad, and virtually non-existent civil society effectively rule out the primary function of the first (whereby non-state actors lobby the state to commit to and comply with international law). Social groups independent of the party-state (to the extent they exist) are never free to organize or express contrary political opinions. Certainly public opinion tends to mobilize around policy positions adopted at the center, but this is a second-order phenomenon. Social internalization is a function of political internalization, and has no independent role to play in explaining how EEZ norms come to bear in China.

As for the second, judicial internalization mechanism, China's judiciary is almost entirely disempowered, especially on matters of political salience (Lubman 1999; Diamant, Lubman, and O'Brien 2005). No court has the authority to strike down a government agency's policy, nor practical means to question any state actor's interpretation of a national law or regulation. Lawyers, meanwhile, within and without government are a marginalized profession and play peripheral roles, even in government agencies charged with regulating or implementing law.[77]

[76] Social internalization relies on an informed public that can mobilize in interest groups to lobby the state; judicial internalization relies on court actions and judicial interpretations for its effectiveness; political internalization hinges on political elites' adoption of the norm into policy. See Koh 1997: 2656-2657; Koh 1998: 623.

[77] For example, Jiang Ping 1997 refers to an "absence of dignity among the Chinese people for lawyers' communities….The image of the lawyer is declining." Minzner (2013) reviews the history of legal education and notes the prevailing view of law as peripheral and lawyers as low-status workers.

The international lawyers within government are perhaps the weakest players in the Chinese foreign policy apparatus. Even if diplomats in the PRC Ministry of Foreign Affairs are well-socialized in international legal environments and increasingly identify as part of an epistemic community that values prevailing legal norms (Johnston 2008), they have virtually no access to foreign policy decision-making (Jakobson 2014). In short, there are few if any judicial or legal checks on the political autonomy of the CCP. Theorizing an independent role for judges and international lawyers is misleading in this case (and in many others).

Only the third process, that of "political internalization" by elites, is a plausible pathway through which international norms might enter Chinese domestic institutions. Party-state leaders exercise centralized legislative, executive, and judicial authority to choose which treaties to enter and determine whether and how their norms are incorporated into law and policy. Political judgment that the international legal norms in question are important and worth implementing in some fashion creates necessary and sufficient conditions for those norms to have influence on the legal institutions of the state, and to disseminate more widely to other social actors. This overwhelming discretion for political elites in the PRC strongly recommends tailoring the internalization process to suit the particular political and legal institutions of the Chinese state.[78]

Although Koh anticipates that his "theory of norm-internalization…explains how internalization can promote the domestic transformation of polities from illiberal to liberal,"[79] the CCP's steadfast resistance to "peaceful evolution" and wariness of liberalizing political reform make this a highly dubious proposition in the case of China.[80] He is nonetheless committed to an

[78] Chapter 4 devotes extended discussion to this claim.
[79] Koh 1998: 677
[80] Shambaugh 2008: 41-160 spells out the CCP's sustained internal discussion in the wake of the collapse of the Soviet Union about erecting bulwarks against liberalization that could threaten the primacy of the party.

important axiom about the transformational potential of international legal norms, borrowed from IR. Koh claims that habitual practice can "*constitute the identity* of the state as a law-abiding state, and hence, as a 'liberal' state."[81] The identity-constitutive aspect of his reasoning should be preserved; the liberal triumphalism should not.[82] That insight is best realized in this case by focusing only on the political leg of the internalization triad.

(4) *Indeterminacy is a property of both the EEZ and Chinese legal rules and processes*. A final and generic critique of TLP is its tacit faith in the basic determinacy of legal norms. The theory presumes that the transnational legal process will ultimately produce a reasonable, shared, and authoritative decision on a norm's content and scope. Koh theorizes the process of interpretation as a panacea to any lack of clarity or coherence in the norms under consideration. Although there may be much hemming and hawing in the process of reaching an agreement about a treaty or rule, ultimately the process "forces an *interpretation* or enunciation of the global norm applicable to the situation."[83] There are ample reasons to doubt that any single, agreed "global norm applicable to the situation" has crystallized in the case under inquiry – nor indeed, should we expect one to emerge in many politically contentious arenas of international law. In the EEZ, as in so many domains nominally governed by international law, many of the relevant norms are indeterminate – that is, they admit of multiple equally reasonable interpretations.[84]

[81] Koh 1997: 2603, citing Klotz 1995: 478. Italics in original.
[82] The presumption that such identity transformations tend towards liberalism is sometimes questioned. Norm-oriented scholars sometimes recognize that the model of transformational change is not just one of "'diffusion' of liberal institutions and practices, but one through which the preferences and identities of actors engaged in transnational society are sometimes mutually transformed through their interactions with each other…Modern networks are not conveyor belts of liberal ideals but vehicles for communicative and political exchange, with the potential for mutual transformation of participants" (Keck and Sikkink 1998: 214).
[83] Koh 1997: 2646
[84] "A law is indeterminate when a question of law, or of how the law applies to facts, has no single right answer" (Endicott 2000: 9). It can also be defined as a situation in which "a competent adjudicator can square a decision in favor of either side in any given lawsuit with the existing body of legal rules" (Solum 1987: 462). See also Kress 1989; Bix 1993.

Indeterminacy rears its complicating head in myriad ways for students of international law and international relations. Even for lawyers working in a strictly positivist mode, there is always a "large and important field left open for the exercise of discretion by Courts and other officials in rendering initially vague [i.e., indeterminate] standards determinate, in resolving the uncertainties of statutes, or in developing and qualifying rules only broadly communicated by the authoritative standards."[85] In municipal systems, there is an elaborate judicial and regulatory apparatus that resolves such indeterminacy; in international law, typically no such mechanism exists. Only the state has discretion to make a final determination about the scope and nature of its own obligations. For some legal scholars, such "auto-interpretation" is not so problematic because properly drafted laws and properly trained lawyers and judges will constrain more reckless or opportunistic efforts to distort legal obligations.[86] The scope of indeterminacy is relatively narrow and "discretion is 'relative' because its limits are assumed to be set by law."[87] Those critical of the coherence and efficacy of this epistemic community, however, argue that such exercises of discretion "cannot be detached from the conditions of political contestation in which they are made."[88] Reasonable analysts may differ about whether the entire legal edifice is indeterminate,[89] or only select rules.[90] Whatever that judgment, in the absence of supranational

[85] Hart 1960: 132
[86] Some legal scholars argue that "self-serving auto-interpretation" is constrained by "precision of individual commitments, coherence between individual commitments and broader legal principles, and accepted modes of legal discourse and argument all help limit such opportunistic behavior. Granting interpretive authority to courts or other legal institutions further constrains auto-interpretation" (Abbott and Snidal 2001: 427). Again, this may be a reasonable claim for American and European legal systems, but strains all credibility in the Chinese context.
[87] Hart 1960: 128
[88] Koskenniemi 2004: 198
[89] One of the most stirring critical assaults on international law argues that determinacy in international legal norms is the mark of hegemony: "Consensus is, after all, the end-point of a hegemonic process in which some agent or institution has succeeded in making its position seem the universal or 'neutral position'" (Koskenniemi 1989: 597).
[90] For a potent critique of the "critical dogma," see Solum 1987, who finds irremediable weakness in the "strong" version of the indeterminacy thesis (that the entire system is indeterminate); he notes the factual validity of weaker versions of the indeterminacy thesis, but finds their implications less radical than usually suspected.

authority it is clear enough that the legal outcome in cases of indeterminacy cannot be determined solely by impartial recourse to legal rules.[91]

Social science deals with indeterminacy without the expectation that there is a professional process likely to resolve it. For rationalist IR, indeterminacy takes the form of multiple equilibria: equally likely strategic choices or outcomes in a given interaction. These are circumstances where the payoff will not uniquely determine behavior.[92] Game-theoretic approaches reframe these circumstances as coordination problems, where actors are indifferent among equilibria but common knowledge can provide a focal point for efficient choices.[93] Social-scientifically-minded lawyers are also persuaded by this logic, arguing that simple acts of communication are cheap and efficient ways to smooth away any jagged edges left by indeterminate norms.[94] Proponents of "soft law" believe that such indeterminacy can in fact be a feature, not a bug, of international institutions where "hard" commitments would make wide participation costly, cumbersome and unlikely to persist (Abbott and Snidal 2000).

Challenges to these depoliticized games point to the determinate role of power in forcing the adoption of one norm over another, with some kind of coercion underlying the choice of different distributional outcomes in a given bargaining situation (Krasner 1991). Where there are

[91] There may indeed be an "invisible college of international lawyers" that can resolve indeterminacy of treaty rules in a professional, consistent, unbiased way, but there is little evidence that this college permeates non-western states in any effective way. For this critical argument, see especially Koskenniemi 1989: 35-40. He further questions the weak indeterminacy thesis, which argues that there are "certain 'core meanings' on which professional lawyers agree and peripheral meanings that may be subject to political controversy, and the former suffice to give rise to a solid legal practice" (Koskenniemi 1989: 590). The strong argument he lays out finds even this professional standard to be contradictory and inextricable from the political purposes of powerful actors, even in the absence of bad faith (*ibid.,* 591).
[92] McAdams 2008: 26
[93] Schelling 1980: 54-67. This is the famous example of asking faculty at Yale where they would meet in New York City without giving any parameters on place or time. Their shared cultural and historical and geographic setting made "Grand Central Terminal" a more likely solution, even though it was in no way superior to other options.
[94] Goldsmith and Posner 2002: 133-134.

many Pareto-improving options, politics determines the choice between them.

Others note that the mere belief that there is a functional solution to problems of multiple equilibria is a shibboleth; such faith places the scholar one on side of a great divide on the question of "historical efficiency."[95] Those who see history as efficient do not discount the theoretical possibility of multiple equilibria, but see exogenous factors as sufficient to determine a unique and efficient solution, if only temporarily. Those who believe history to be inefficient, the product of endogenous and sometimes contradictory forces, believe the possibility of convergence on, say, a unique liberal norm on any issue of social importance is near zero.

The "inefficient" thesis is compelling in the case of China and the EEZ. It approximates the basic properties of the EEZ, the characteristics of China's historical encounter with international law, and the path-dependent structure of PRC legal institutions. As will be explored at length throughout the study, many of the vital norms of the EEZ are the products of compromise among the over 150 participants in the negotiations of UNCLOS III. In some cases, these compromises effected reasonably determinate rules; in others, the rules remained indeterminate and susceptible to varied interpretations. This is not necessarily problematic for TLP if the empirical record subsequent to the agreement bears out some gradual convergence around a singular, determinate norm to regulate the domain. In the case of the EEZ, this is emphatically not the case. State practice, not just China's, shows rather substantial variance.[96]

[95] Legal institutions may temporarily "solve" problems of cooperation, but are always subject to historical contingencies and seldom stable in the face of crises. "On the one side are those who see history as following a course that leads inexorably and relatively quickly to a unique equilibrium dictated by exogenously determined interests and resources. On the other side are those who see history as inefficient, as following a meandering path affected by multiple equilibria and endogenous transformations of interests and resources" (March and Olsen 1998: 954).

[96] Kopela 2009: 2-15 and Kraska and Pedrozo 2013: 277-304 catalogue the considerable diversity (and adversity) in state practice in EEZs.

The fraught history of China's encounter with international law and the PRC's subsequent development of its own modern legal institutions are likewise cause to expect Chinese interpretations of indeterminate norms to differ from those expected in rationalist accounts and observed in liberal, Western nations.[97] Coordination on the basis of some shared focal point – be it legal professionalism or efficiency – presumes the preeminence of those values. China's identity – and thus conception of its interests and preferences for coordination – was forged in part through a fraught experience with western international law;[98] contemporary PRC legal institutions bear the distinct imprint of this historical experience, and are not configured to reach an efficient, liberal determination on important political matters. In fact, indeterminacy is a pervasive and seemingly deliberate characteristic of Chinese laws and regulations.[99]

The model must accommodate the possibility that no single "equilibrium" will emerge in state interpretations of key norms in the EEZ. Interpretation is more than a lawyerly process wherein some reasonably coherent epistemic community transnationally negotiates its way to an understanding of a norm that is mutually satisfying, as Koh insists. Implicitly, the focal points that can coordinate in cases of multiple equilibria rely on some significant body of common knowledge, accumulated historically, and interpreted in similar terms. Broadening the aperture of the interpretation phase in the TLP model to account for varied historical experiences and cultural-institutional settings that produce actors with different *identities* vis-à-vis international law is one way to address this problem. With these adaptations intact, TLP can be productively applied to understanding China's complex relationship to the EEZ.

[97] Historical and institutional factors are dispositive when we consider how they inform judgments about what values or interests a given rule should serve. "[P]arties' arguments, and to some extent their preferences, appear to have been shaped by competing general conceptions of what 'legal' institutions, rules, and arguments should look like, and what role international law and institutions should play in international relations" (Reus-Smit 2004: 8).
[98] This claim is the empirical focus of Chapter 3.
[99] This claim is the empirical focus of Chapter 4.

IV. Tracing the Four *i*'s: Methods of Analysis

The theory of transnational legal process employed in this study consists of four linked "*i*" processes: *interaction, interpretation, internalization* and *implementation*. Methodologically, the inquiry follows the TLP model's emphasis on historical process tracing, but departs from it in four crucial respects. (1) We drop the idea that "obedience" is the necessary (or desirable) endgame, recognizing that this is only one possible effect of participation in transnational legal processes. (2) Obedience can be replaced with the process of *implementation*, which gives broader play to those "disobedient" possibilities and acknowledges that state practices are a necessary, untheorized part of any iterated transnational legal process. (3) The internalization process is circumscribed to include only its "political" variant, thus accounting for the properties of illiberal states like China that lack public inputs and institutionalized legal checks on executive discretion. Finally, (4) the key role of indeterminacy is given its due consideration, especially as it pertains to the *interpretation* phase. The solutions to problems of "multiple equilibria" do not lie merely in professional competence or efficiency, but depend upon the identities of the actors faced with choices and opportunities to exercise political discretion.

These processes may be traced through China's historical relationship to the law of the sea, aided by the partial explanatory punch of some of the insights from power, contract and norms laid out in Section I. Rather than adjudicating between them, the empirical analysis accepts that each of the four *i*'s describes a process involving power, contract and norms to varying degrees; excluding one or the other weakens their collective capacity to explain reciprocal influence between China and the EEZ regime. This catholic attitude does not amount to "all of the above." Rather, it presents us with a limited menu of choices for explaining observed phenomena, which can be consulted systematically while those observations are recorded.

An inductive look at a specific state practice tells us something about a state's intentions that deduction from revealed preferences (a basic method implicitly shared by power and contract theories) cannot. Such induction enables us to trace a process from the decision to exercise some particular jurisdictional competence in an EEZ, to organize, equip and train people for the task, to expend budgetary (or deploy military) resources in their defense, and to seek diplomatic recognition for the legitimacy of that jurisdiction and associated practices. The deductive reasoning employed in strict power and contract approaches infers a state's interests from its behaviors. Yet when those behaviors are irregular over time and space,[100] contradictory over the same issue area, or consistent with multiple "basic causal factors,"[101] explanation requires closer scrutiny of the actual practices involved.[102]

The four *i* framework structures the analysis. Each phase involves different actors and highlights distinct phenomena: *interaction* calls attention to the interests motivating PRC interactions in UNCLOS; *interpretation* reckons with the historically- and culturally-based identity informing Chinese elites' beliefs about the purpose and function of the regime; *internalization* maps how domestic institutions adopt and alter UNCLOS norms; *implementation* shows how those norms prompt the agents who carry out Chinese maritime law in practice. Considered in light of this case, where the EEZ norms enable China's pursuit of closure, the four *i*'s present a story about what might be called the dysfunction of international law.

[100] From a formal standpoint, we might say that observations of the same phenomenon which vary across different ranges on the independent variables are evidence of heteroscedasticity. This leads to bad things like causal heterogeneity – untheorized differences in treatment effects that may result from expanding your *n* and thus introducing unlike units or new variables (Keohane, King and Verba 1994).
[101] Krasner 1982b: 499.
[102] I am following Kratochwil 1989, Adler and Pouliot 2011, and Meierhenrich 2013 in distinguishing practice from unintentional or automatic "behavior" in response to some stimulus or incentive; it is also different from the more intentional and purposive "action." Practice is intentional and purposive, includes behavior components of "natural" responses, but is also patterned, routinized, recognized intersubjectively as having a certain sort of meaning. For example, a practice of routine coast guard patrols of a particular area or consistent diplomatic protest to another state's claim using legal language would be undertaken to pursue defined goals (Chinese claims to jurisdiction and sovereign rights) that are recognizable to other states as an assertion of legal (and other) interests.

Tracing this pattern of Chinese participation in transnational legal processes allows us to observe whether and how expected, salutary effects of participating in transnational legal processes break down. Obedience is the most visible and significant of these presumed salutary effects, and one from which China's practice departs in observable ways. China's deviation from the "teleology of obedience" is especially remarkable in its maritime disputes. The disputes showcase a Chinese version of "the rules" that differs substantially from those of other states engaging those same law of the sea norms, providing a venue to observe how China uses those norms as instruments to pursue closure of disputed space. Koh recognizes that such disobedience is possible,[103] but neglects any exploration of what leads to that outcome and where the transnational legal process goes off the rails. The Chinese case presents a corrective to this explicitly normative vision, presenting us with a practical question about what other attitudes and behaviors result from participation of powerful, non-Western states in transnational legal processes.

Comments on Case Selection

The choice of this particular case of China and the law of the sea may be understood as fitting certain desirable selection criteria for social science. Specifically, the proposed substantive legal focus on the EEZ regime as creating specific kinds of rights and obligations gives us two kinds of valuable leverage that may be used to generalize from a "crucial case." Furthermore, the procedural focus on China's overall engagement with international law bears all the characteristics of an "influential case" that should lead us to think that observations in the

[103] Indeed, in his seminal essay on TLP he announces his purpose as answering the question "If transnational actors do generally obey international law, why do they obey it, and why do they sometimes disobey it?" (Koh 1997: 2600). He also recognizes strong agency, for the United States in particular, when he "predicts that nations will come into compliance with international norms if transnational legal processes are aggressively triggered by other transnational actors in a way that forces interaction in forums capable of generating norms, followed by norm-internalization" (Koh 1996: 206). Focusing on the positive, pro-social outcome of obedience leads him to neglect why and when and how transnational legal processes do not work in desired ways.

Chinese case are more important than most other cases, and may generate further testable propositions about how relationships between sovereign states and international law vary historically and geographically.

A "Sinatra" Case for Law-as-Constraint. An international legal regime like the EEZ is an attractive candidate for study as a "crucial, least-likely" case[104] for the *constraining* (or regulative) effect of international law. This is the principle expectation of the contract theorists and the principle foil for power theories that question law's capacity to hinder a state's freedom of action. It is "least likely" because any rule of international law that has bearing on the territorial integrity of the state is a prime candidate for being irrelevant. States jealously guard this sovereign prerogative – it is requisite for survival (Waltz 1979) – and are unlikely to brook uninvited encroachment on their territory (or any geographic space under their jurisdiction, like an EEZ). Similarly, a strong state should not be expected to honor a rule that infringes on its security or national defense strategy. If a navy has the capability to operate in a particular space and a security interest in doing so, we may reasonably doubt the capacity for any law to curtail its freedom of action in the breach. These are laws that seem highly likely to exist only in the minds of the bureaucrats who drafted the Convention, and among the least likely of laws to constrain states when it counts.

The selection of China also adds significant weight to the "least-likeliness" of this case. In the first place, most scholars believe great powers to be less constrained by international law than are smaller states. China is even less likely to be constrained than the typical great power (if such a thing could exist) because of its traditional hostility to "Western" or "hegemonic" international law (Cohen and Chiu 1974; deLisle 2000, Pan 2011). Most directly, that the laws in question

[104] Gerring 2007: 659-663

would constrain China's ability to pursue its interests in maritime disputes with major historical, economic and strategic significance make for an especially hard case. Chinese elites and top leaders have placed defense of China's sovereignty to disputed islands and protection of the various "maritime rights and interests" that this sovereignty entails among their "core interests." The proposition that a rule of international law could meaningfully shape their pursuit of these basic state goals puts the question of law-as-constraint to a very hard test.

China's geography also warrants doubt that it would "obey" such a regime: the vast space enclosed by EEZs effectively "zone-locks" China, in the sense that vessels leaving China must pass through another state's EEZ to reach the high seas. In peacetime or otherwise, no strong navy would voluntarily submit to having its freedom of action curtailed. Finally, for a political regime that jealously guards its territorial integrity, the idea that a multilateral treaty and associated legal obligations could occasion any slackening in its maritime vigilance seems far-fetched. The combination of these factors (i.e., a law likely to be ignored, and a state primed to reject international laws of that type) makes this into something of a "Sinatra" case: if international law can make it here, it can make it anywhere (Levy 2008).[105]

A Prime Candidate for Law's Transformative Effects. Parallel to the unlikelihood of the EEZ imposing meaningful constraints on China, the case also fits the bill as a "crucial, most-likely" case[106] for the *transformative* effects of international law upon state identity and interests. This is principally because the EEZ regime actually creates new legal rights where none existed before. Virtually all of the area that is now claimed as state-regulated EEZ was previously high seas in

[105] In other words, if contract is operating strongly in this case, it should also operate in other, less challenging circumstances. Matthew Evangelista suggests that this be further specified as a "New York, New York" variant of a "Sinatra Case," noting that Soviet foreign ministry spokesperson Gennadi Gerasimov's invoked the "My Way" variant of the Sinatra Doctrine to replace the Brezhnev Doctrine in Eastern Europe.
[106] Gerring 2007: 659-663

which no state enjoyed any sovereign rights or jurisdiction beyond its own flagged vessels and nationals. As such the EEZ is an example of a distinct type of bargaining problem for which international law is a possible solution – "division of new or potential benefits…obtainable by cooperation" (Fearon 1998).[107] This is the legal equivalent of a free lunch, and quite naturally creates new rules of the game and new reasons for action – because there was in fact no game to speak of in the EEZ for the state prior to the development of the regime.

In this case, the logic of law as a constraint is especially unlikely to be in play. There is virtually no circumstance produced by the new EEZ regime in which some agency or actor is asked to renounce some former privilege or rent in order to come into compliance and serve some broader state interest. Instead, the incorporation of a vast new space is a massive job-creation engine for any state that cares to cash in on its EEZ entitlement: lucrative new real estate for fishing, oil and gas development, mineral exploration, scientific research, eco-tourism, and of course all of the associated law enforcement responsibilities that go with it. How could any decent bureaucrat resist? What state would reject a contract that endowed them with new resources and real estate without levying any direct costs? How could that state fail to adapt itself to accommodate this windfall with its domestic institutions?

The historical process by which the EEZ came into existence also contributes to its likelihood of constituting new state interests and identities. Specifically, the fact that the extension of jurisdiction was principally a project of the unwashed masses of the global South gives it a high degree of representativeness and legitimacy in the eyes of most of the states party to UNCLOS III. Many of these states had not participated in a major international legal regime before – the

[107] The other type of problem in international cooperation for Fearon results from "attempts to renegotiate an existing cooperative arrangement," which has a different strategic structure and requires a different sort of analysis.

People's Republic of China most prominent among them, having been excluded from the UN until 1971. There are especially compelling reasons such novice states are prone to be "socialized," or otherwise learn about international law, how to internalize it, how to practice it, and how to use it instrumentally.[108] This is a compelling circumstance for international law to exert a transformative influence on states, and vice versa. We need only to assume that states are likely to want the law on their side to expect that their behaviors will be shaped, in some way, by the desire to influence how rules of international law are interpreted and practiced.

A Canary in the Coal Mine. China's relationship to an international legal regime is also a prototypical "influential case" that might encourage a "substantive reinterpretation of the case – perhaps even of the general model."[109] Simply put, China matters much more than a randomly sampled case (unless that case happens to be China or the US). This axiom holds across virtually any aspect of international relations, regardless of the analyst's theoretical stripes. China has the world's biggest population, boasts the second-biggest and fastest-growing economy, fields a nuclearized and rapidly modernizing military, maintains a distinctive socialist ideology, a resilient authoritarian Leninist party-state, a profoundly "non-Western" culture, and is dissatisfied with present distribution of territory.[110] And all of this while buying up trillions of dollars of the most "Western" power's debt and becoming the indispensable trading partner to most of the developed world. It is governed by an illiberal, unelected authoritarian regime under severe economic, social, environmental, and political strain. The fate of this highly dynamic China and the fate of the international system are inextricably bound, and this is nowhere more

[108] See Johnston 2008: 39-43
[109] Gerring 2007: 657
[110] This is the case by definition, independent of our evaluation of whether or not China is "a dissatisfied revisionist power" or not (Schweller 1999; Johnston 2003). Another state controls territory that China claims, so its preferences necessarily entail a change in the distribution of territory. Disputes over Taiwan, other offshore islands, and (arguably) sovereign rights and jurisdiction over maritime space all fit the bill.

obvious than in the international legal domain. If China's relationship to international law cannot be explained by our dominant theoretical models, then those models are not properly adjusted to contemporary international relations.

Testing an influential case "begins with the aim of confirming a general model."[111] Yet there is no such general model accepted by consensus across IR and IL disciplines. This study distills the main contenders – the arguments from power, contract and norms – and evaluates their effectiveness in explaining a particular transnational legal process. If we find that China confirms one or more of these theories, then we have strengthened our existing grasp of an important subject with more research (and maybe added some theoretical bells and whistles). If, as seems likely, the existing apparatus doesn't reliably predict (or retrodict) China's influence on international law, and vice versa, we have strong reason to begin revising our general model. An IR or IL theory that needs to exclude China has limited utility in the modern world. This is something like the obverse Sinatra doctrine: if it can't make it here, it can't make it anywhere.

Going beyond China specifically to a system-wide appraisal, this influential case directly engages conflicts in the maritime domain involving the major security and economic interests of at least three of the great powers in the system: China, Japan and the United States. At the present moment, how international law is influencing each of them individually may be roughly accountable under existing theory, but there is obvious systemic importance in these parties' negotiation over how international law is going to "work" among them. Even if the effects are contained within the region (an unlikely restriction), a suitable framework for understanding how international law shapes East Asian international relations is a necessity for scholarly and practical reasons. In broad tectonic terms, China's rising power (relative to the region and the

[111] Gerring 2007: 658

United States) is already straining the rules and rights that underpin the post-war order (Gilpin 1981). This process contributes to an uncertain hierarchy of prestige as China demonstrates a capacity to erode American alliances and influence in a region in which it has long been the indispensable actor (Ikenberry 2001; Katzenstein 2005). Signals of decreased American commitments to these alliances and the liberal order they uphold are further reason to consider this case as an influential for anticipating and understanding developments in international law.

Extending this system-level appraisal, there are many reasons to consider how international law will work in a global system increasingly defined by "sinicization," making "the world suitable to China and the Chinese."[112] Chinese influence on the basic patterns of international relations may be conceptualized in terms of creation of an Eastphalian (Ginsburg 2010) legal regime or establishment of a *tianxia* (Carlson 2011; Khong 2014) political system in East Asia or globally. This means, at a minimum, that international law's function will vary where China is involved and may even be transformed more generally by virtue of China's structural power. More prosaically, we should not expect much external validity from a model that excludes "as many as 20%-30% of the observations of major power behavior"[113] by failing to adequately study and describe China (and Japan). The larger the sample, the less important the individual cases. But in this arena of international law among great powers, our cases are severely limited and each one counts a great deal. This case strongly recommends itself as a canary in the coal mine for evaluating how well our conventional understanding of international law explains important international political phenomena. It is not general or radical enough to overturn any grand theoretical conceits, but it is positioned to make modest theoretical and empirical contributions that will help us make sense of a few contemporary problems of international politics.

[112] Katzenstein 2012: 9
[113] Johnston 2012: 56

Chapter 2

China's Interaction with the Law of the Sea: Chinese Interests with Third World Characteristics

> "At present, the international situation is most favorable to the developing countries and the peoples of the world. More and more, the old order based on colonialism, imperialism and hegemonism is being undermined and shaken to its foundations. International relations are changing drastically….The struggle to defend sea rights initiated by Latin American countries has grown into a worldwide struggle against the maritime hegemony of the two superpowers."
>
> - PRC President Deng Xiaoping[1]

> "The adoption of the Law of the Sea Convention is a victory in the long-term struggle of the Third World countries for equal maritime rights against the superpowers' maritime hegemony."
>
> - Editorial, *人民日报* [People's Daily] (4 May 1982)

The Third UN Conference on the Law of the Sea ("the Conference"), held from 1973 to 1982, marked China's first participation in "international legislation"[2] with its newly-gained seat on the UN Security Council.[3] The Conference produced a new treaty, the Third UN Convention on the Law of the Sea (UNCLOS III), with ambitious aims to realize "codification and progressive development of the law of the sea."[4] It remains the

[1] People's Daily 1974, "Speech by the Chairman of the Delegation of the PRC, Deng Xiaoping"

[2] "国际立法" is a commonly used term in Chinese writing on international law and international relations.

[3] The PRC replaced the Republic of China in the UN in October 1971.

[4] UNCLOS III, Preamble

largest multilateral treaty other than the UN Charter itself, and establishes a comprehensive legal regime designed to govern the use, protection and development of the world's oceans and their living and non-living resources. The proceedings prompted unprecedented international participation (158 nations by the later stages), most of them colonized or non-existent throughout all but this late but productive stage in the long historical development of the international law of the sea. Beijing strongly and explicitly identified itself as a core member of this Third World group, then joined 116 other states in signing the Convention at the conclusion of negotiations in December 1982.[5]

This Chapter analyzes the first of the 4 *i's* in the adapted transnational legal process theory: *interaction*, the process by which states debate and create new international legal norms. We observe this process through the PRC's participation in multilateral treaty negotiations at the Third UN Conference on the Law of the Sea (the "Conference"), where its representatives met with those of other states to forge UNCLOS III. From 1968 (when the UN General Assembly began considering another law of the sea treaty) through 1982, these states engaged in repeated interactions to reconcile their varied interests in control of maritime space. Ultimately, this process not only codified existing customs but also established new norms – among them, norms underpinning the new regime of the exclusive economic zone (EEZ). The object of the Chapter is to start plotting the reciprocal influence between China and the EEZ regime at the point of initial contact between the state and international law – namely its national interests in

[5] The PRC ratified UNCLOS III on June 7, 1996. The negotiation of the content of the Convention closed in 1982, though a long period of negotiation of an additional Implementing Agreement for Part XI ensued to deal with provisions concerning deep seabed mining which do not touch directly on the questions of state jurisdictional zones at issue in this study. The "package deal" adopted in 1982 is therefore the text of most consequence for this analysis and can be reliably treated as the "contract" to which the PRC consented.

participating in the treaty-making process. What were China's interests in the EEZ and how did its delegates represent them in interactions at the Conference?

Questioning China's Interests in the Law of the Sea

China's positions at the Conference are inconsistent with its conventionally understood national interests, rendered in terms of wealth and security. PRC negotiators supported various disadvantageous aspects of the treaty, then ratified it as part of a broader Third World "struggle against maritime hegemony," not to directly advance any material interests. In fact, PRC delegates adopted and promoted the specific treaty preferences of developing states whose material interests in the content of a law of the sea treaty differed substantially from China's own. Evidence from China's participation in the Conference supports a conclusion that China treated the law of the sea treaty as instrumental to a meta-political aim, shared with the Third World, to overturn Western dominance over "the rules" for the world's oceans.

Despite manifest costs, China pressed for greatly augmented authority for states to determine the allocation of legal rights, in direct opposition to the Western, liberal doctrine of market-based allocation (Krasner 1985). This illiberal doctrine underpins China's efforts to promote indeterminate legal principles rather than determinate laws that could be invoked equally and uniformly by all states, and renders intelligible China's idiosyncratic preferences for substantive rules promoting closure. China's leaders expected that the indeterminate legal norms thus created would not constrain them, in practice, from the exercise of domestic political discretion about the depth and breadth of their binding legal obligations.

Not only did China consent to be bound by this new legal regime, the PRC delegation to the Conference enthusiastically promoted rules that guaranteed it an inferior allocation of marine economic resources, failed to mitigate known maritime security threats, exacerbated political-military strife over its several existing maritime disputes, and even generated several new disputes over maritime boundaries.[6] The PRC delegation also bargained for procedures that explicitly denied China advantages in voting and drafting of the treaty text, and accepted a "package deal" from which it could not dissent with reservations.[7] By nearly any measure, the substance of the treaty imposes major costs on China; the benefits, meanwhile, are distributed in such a way that China is relatively worse off. This relative loss was especially clear in view of the benefits to maritime great powers like the United States, the Soviet Union, and Japan, whose traditional law of the sea regime China and its Third World collaborators aimed to renovate so as to promote greater equity and control for weaker states in this important domain. Those weaker states were much better served by the new law of the sea arrangement than the geographically disadvantaged Chinese, who nonetheless ratified a treaty that mostly satisfied Third

[6] China disputes sovereignty to three island groups in the South and East China Seas, with associated disputes of maritime jurisdiction and boundaries. Independent of those sovereignty disputes and their jurisdictional implications, China also has undelimited maritime boundaries with all of its maritime neighbors (Japan, North Korea, South Korea, Taiwan, the Philippines, Malaysia, Brunei and Indonesia due to overlapping exclusive economic zone claims. It also contests its jurisdictional rights in undisputed zones related to its claims to additional coastal state rights (especially the rights of warships in the territorial sea and exclusive economic zone).

[7] Nor could China exempt itself from compulsory dispute resolution that might infringe on its jealously guarded sovereignty. Despite this, Tao Jing 2014 argues that China successfully insulated itself from "sovereignty costs" by joining the treaty only with reservations about the issues that could be brought to compulsory third-party dispute resolution through the Convention. Although China did formally declare such reservations, it could not legally exempt itself from arbitration under UNCLOS on a broad class of issues (see UNCLOS III Articles 298, 309, 310, discussed at length in Part III of this Chapter). Tao's argument is, in fact, falsified by events: China was subject binding arbitration with the Philippines under UNCLOS Annex VII dispute resolution procedures: The Republic of the Philippines v. The People's Republic of China, *Permanent Court of Arbitration* (2013). China rejects the legitimacy of the arbitration, claiming it infringes upon its sovereignty – but the award is considered binding under international law because China explicitly consented to its jurisdiction when it ratified the treaty.

World demands. With such commitments, practicing strict compliance with UNCLOS III obligations would inevitably hurt China, in both relative and absolute terms.

The manifest costs of UNCLOS have not (yet) led the PRC to renounce or withdraw from the treaty, nor do they prevent Chinese officials from continuing to laud UNCLOS III – and stress China's adherence to its interpretation of the treaty – in front of domestic and international audiences. Chinese leaders advocate UNCLOS rules and principles as appropriate for the resolution of various maritime disputes, even as they reject their practical use for such purposes.[8] Beijing even devotes growing personnel and state resources to achieving nominal compliance with the treaty, and continues routine participation in its management at the UN.[9] As costs related to its maritime disputes mount, private dissent about the wisdom of remaining within the treaty is circulating among Chinese elite, but for the foreseeable future Beijing appears bound to the treaty, even if it is not willing to comply with important provisions.[10] The reasons for PRC ratification of such a treaty are mysterious if we rely on conventional rendering of their interests, so this chapter explores the ways Chinese experts and diplomats identified their interests and assessed the purposes of UNCLOS III.

[8] Wang 2015. For China's rejection of the role and UNCLOS in determining important maritime questions, see its practice regarding the Philippines' UNCLOS arbitration, e.g. PRC Ministry of Foreign Affairs of the People's Republic of China 2014.
[9] The Department of Marine and Boundary Affairs was established in the PRC's Ministry of Foreign Affairs in 2009 and now devotes the largest volume of personnel to UNCLOS affairs of any other state party (author interview with MFA official, November 2014). Its domestic maritime law enforcement and administrative agencies have grown by several orders of magnitude over the last two decades. On these bureaucratic changes, see PRC State Oceanic Administration 2014; Zou 2001, 2005; Martinson 2015.
[10] Author interviews, Hainan and Beijing (August 2014).

Section I examines China's participation in the Conference, drawing extensively on the official records of PRC delegates' participation in the meetings,[11] formal position papers, domestic legal scholarship and commentary.[12] The dominant pattern that emerges from this evidence is China's illiberal, indeterminate and "closed" positions on substantive and procedural elements of the treaty. Section II then evaluates Chinese elites' internal assessment of the new regime, which demonstrates clear awareness of its various "defects" yet supports ratification. The Chapter concludes that explaining China's position demands a prior account of how China's identity and historical circumstances produced its particular constellation of interests in the treaty, a subject taken up in the subsequent Chapter on interpretation.

I. China's Interaction: Forging a New Convention on the Law of the Sea

The PRC delegation to the Conference represented Chinese interests that were, by design, nearly indistinguishable from those of the large group of Third World states known as the G-77. That caucus included over 120 states, over two thirds of the participants in the Conference over its long negotiation between 1973 and 1982. These states adopted consensus positions in order to bargain from strength against the big maritime powers. China had precisely this goal in mind – supporting the Third World against "maritime hegemony" – in considering its own interests in a new law of the sea. This meant

[11] The complete transcripts of all open sessions of the Conference and limited documents preceding it are available in United Nations 1973-1982, *The Third UN Conference on the Law of the Sea, Official Records, Vols. I-XVII.* Henceforth these records will be cited according to their U.N. Document numbers *(e.g.,* A/CONF.62/WS/37)

[12] This commentary draws on published writing as well as author interviews with members of the PRC Ministry of Foreign Affairs, Bureau of Treaty and Law (Beijing, November 2014); PRC Ministry of Foreign Affairs Bureau of Maritime and Boundary Affairs (Hainan, August 2014); and one member of the PRC delegation to the Conference, now at the Chinese Academy of Social Sciences (March 2015).

adopting substantive positions that promoted greater equity in marine resources for the developing world. It meant pushing for a regime to incorporate principles and procedures that ensured a greater degree of authority and control for sovereign states based only upon their geography – an illiberal, authoritative allocation that supported a programmatic goal of closure of coastal maritime space.

The words of the Chinese head of delegation early in the Conference offer a striking account of how the PRC conceived of its interests within the treaty negotiation:

> The new legal regime of the sea should accord with the interests of the developing countries and the basic interests of the peoples of the world. The superpowers [are] trying to exploit certain differences among the developing countries in order to control, dominate and plunder them. All developing countries, although they might differ on specific issues, must unite against hegemonist policies [of the maritime powers]. The fundamental and vital interests of developing countries [are] closely linked, and unity [will] bring victory in the protracted and unremitting struggle. China [is] a developing socialist country belonging to the third world. Its Government [will], as always, adhere to its just position of principle, resolutely stand together with the other developing countries and all countries that [cherish] independence and sovereignty and [oppose] hegemonist policies, and work together with them to establish a fair and reasonable law of the sea that [will] meet the requirements of the present era and safeguard the sovereignty and national economic interests of all countries.[13]

China's delegation, in its rhetoric at least, conceived of the Conference as an opportunity to develop new international norms in the maritime domain by supporting the interests of the Third World as a foil to the "superpowers' maritime hegemony." Blustery, ideological rhetoric aside, Chinese interaction at the conference was quite substantive. A small but vocal Chinese delegation spoke out and wrote position papers prior to the Conference, played active roles in drafting committees and general meetings, and advanced G-77 positions in its interactions in formal and informal interest groups.

[13] A/CONF.62/SR.25

Indeed, it caucused with the G-77 and adopted the group's positions even when they were not its own prior to the Conference, and were costly compared to available alternatives. China chose to defer to the developing world on everything from technical questions of fisheries management and environmental conservation to highly politicized issues of redistribution of state control over strategically and economically salient maritime space.

China's substantive participation reveals clear-cut preferences for rules promoting a "closed" regime for the EEZ – i.e., one in which coastal states enjoy greater rights over maritime space. *Closure* is the creation and enforcement of additional rights for states in maritime space. The broader the geographic scope of those rights and the greater the substantive jurisdiction assigned to the holder of those rights, the higher the degree of closure. The doctrine underpinning this closed regime is *illiberal* in the basic presumption about the autonomy of individuals or states: where there is no law expressly granting a state (or a flagged vessel) a specific right, the coastal state can regulate or forbid its action.[14] As opposed to the liberal norms that allowed "first-come-first-served" access, a market-driven system in which the more powerful maritime user states would prevail, China adopted the position of weak, small, developing states to carve out authority for states that could undermine the prevailing open regime. China joined Third World efforts to augment the content and scope of rights explicitly granted to coastal states, effectively limiting the rights held by user states, and granting the coastal state

[14] This presumption or principle stands in contrast to the "Lotus principle" in international law, which holds that "all that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction" (*Permanent Court of International Justice* 1927, at 47). The liberal character of this principle lies in its granting freedom to a state (or any individual or unit) unless that freedom is expressly abridged by a positive rule of law. China's stance is the inverse: where there is no law otherwise, the state enjoys a prerogative to abridge rights according to its discretion.

discretionary authority to decide when and where its jurisdiction can be exercised over other states. In this respect, PRC authorities tended to prefer that rules be constructed in ways that left them *indeterminate* – that is, permitting multiple and possibly contradictory interpretations. Due to the steady efforts of China and its Third World comrades, many of the critical rules governing the EEZ were vague, left to be interpreted based on principle (and political discretion) rather than on the basis of precisely defined statutes that leave little room for ad hoc judgments about its application.

These key elements – illiberalism, closure, and indeterminacy – are manifest in China's record of participation in creating the new oceans regime. Specifically, they are found in: (a) The various proposals for norms set out by Third World states that would lead to the creation of a new zone beyond the territorial sea; (b) the near-verbatim appearance of these Third World norms in Chinese statements and working papers in the UN prior to the Conference; (c) PRC delegates' specific proposals during the Conference on procedural issues like voting rules and representation; and (d) PRC inputs regarding a raft of substantive questions about how to engineer desired rules in to the Convention – notably, in a consistent effort to afford maximum discretion to coastal states to determine the contours of the emerging EEZ regime. Finally, with these preferences intact, we can analyze (e) how norms help explain China's interest in committing to the treaty.

This section consults the record of this extensive Chinese participation in rule-making for UNCLOS III, available in exquisite detail through Conference records, a host of specialized commentaries by conference participants,[15] and in official legislative

[15] Center for Oceans Law and Policy 1985, 1993

histories[16] of various elements of the treaty, all published by the UN. These documents provide an authoritative and precise account of PRC interests and specific preferences for the treaty.

Pre-Conference Interactions: The Third World Defines EEZ Norms

The direct catalyst within the UN for a new round of law of the sea negotiations came in November 1967, in the form of a dramatic speech in the General Assembly by the Maltese UN representative, Arvid Pardo.[17] He introduced his remarks in explicit opposition to the maneuvering of the United States to keep his "premature proposal" off of the floor. The existing, market-based legal regime gave open access to the vast majority of the world's ocean and seabed to the US and a small number of other advanced, industrial users capable of raising capital and deploying technology. In Pardo's reckoning, "[c]urrent international law encourages the appropriation of this area by those who have the technical competence to exploit it." That liberal regime effectively excluded the developing world. Pardo poignantly articulated the Third World's call for equity, justice and non-market allocation – not only of resources, but of strategic space monopolized by the superpowers. Pardo advocated a new regime that could better deal with negative externalities of pollution and unsustainable fishing and mining.

His speech gave publicity to the notion that the Third World had an equal stake – or, given the composition of the nations in the UN, a majority stake – in preserving the "common heritage of mankind" in the world's oceans. Pardo's words precipitated the

[16] United Nations Division for Ocean Affairs and Law of the Sea, Office of Legal Affairs 1992, 1995
[17] Pardo 1967

formation of a 35-nation UN Ad Hoc Committee to Study the Peaceful Uses of the Sea-Bed and Ocean Floor (the "Seabed Committee")[18] to consider the question of how to treat resources beyond the limits of state jurisdiction. Despite American and Soviet efforts to keep this movement from gathering momentum, it garnered widespread support throughout the developing world – a group that had recently come to dominate the UNGA – and ultimately became a permanent, 42-member committee whose work gave rise to the Conference.[19] These discussions initially dealt with the deep seabed *beyond* state jurisdiction, but also produced a concomitant effort to determine the limits of state jurisdiction. Although they did not draft articles in advance, as had been done by the International Law Commission prior to the first two UNCLOS conferences, the Seabed Committee established certain core norms for the Convention that would follow.

Following the work of the Seabed Committee from 1968-1973, the UNGA went on to authorize a third attempt[20] to codify and develop the law of the sea "in response to the advance of technology, to the demand, especially by the developing countries, for greater international equity, and by the new uses of the sea and its resources."[21] The Seabed

[18] A/Res/22/2340 (XXII) UNGAOR, UN Doc A/6716 (18 December 1967)
[19] UNGA Resolution 2467 A (XXIII) (December 21, 1968) established a Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction, consisting of forty-two Member States. Subsequently, the General Assembly decided by resolution 2750 C (XXV) (December 17, 1970) to convene a third conference on the law of the sea in 1973, and instructed the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction to act as preparatory body for the conference.
[20] Lacking a UN seat, the PRC had not been eligible to participate in the prior two UN conferences on the law of the sea, held in 1958 and 1960. Only the first of those sessions produced any agreed laws, in the form of the four Geneva Conventions on the Law of the Sea: Convention on the Territorial Sea and Contiguous Zone, 29 April 1958, 516 U.N.T.S. 206 (entered into force 10 September 1964); Convention on the High Seas, 29 April 1958, 450 U.N.T.S. 11 (entered into force 30 September 1962); Convention on Fishing and Conservation of the Living Resources of the High Seas, 29 April 1958, 559 U.N.T.S. 285 (entered into force 20 March 1966); Convention on the Continental Shelf, 29 April 1958, 499 U.N.T.S. 311 (entered into force 10 June 1964).
[21] Koh 1983: 6

Committee's work was dominated by Third World states who advocated a set of new norms for state jurisdiction well beyond the traditional limits of the territorial sea. The principles underlying these norms were abstract: justice and equity for states marginalized by advanced industrial countries' dominance in the world's oceans. They directly influenced the PRC position – and remained the core principles espoused by the Chinese long after their initial positions were diluted in negotiations (Yuan 1984).

These ideas had been promoted and refined over years of discussion within the UN and in regional groupings. The emerging notion of the EEZ, in particular, was fundamental to narrowing the scope of great maritime power dominance of the seas. Beginning in 1952 with the "Santiago Declaration" by Chile, Ecuador and Peru at the First Conference on the Exploitation and Conservation of the Maritime Resources of the South Pacific,[22] Latin American states pioneered the concept of a new zone that could guarantee "food supply and economic development" (Santiago Declaration, Article 1) for the developing world by endowing those coastal states with "sole sovereignty and jurisdiction…[over] not less than 200 nautical miles." That Declaration also advanced the view that islands, no matter their size or geological characteristics, would generate zones.

The negotiations of UNCLOS I created four Conventions in 1958 – one on the territorial sea, another on fisheries, another on the continental shelf, and another on the high seas – in which less developed countries were badly underrepresented and unable to effectively push forward these proposals. Only 86 states attended and less than 50 states, mostly European, acceded to each of these Conventions. A failed effort by a somewhat more

[22] U.S. Department of State, Bureau of Intelligence and Research, Office of the Geographer 1979: 6

representative group to address some of the lingering issues from UNCLOS I (in the form of UNCLOS II in 1960) produced no new treaties. These failed efforts set the stage for continued struggle throughout the 1960s to develop an oceans regime that would codify the limits of coastal state jurisdiction, and to define the rights and duties of states beyond that limit.

The push for a new oceans regime culminated in a series of declarations from the Third World that spilled out of the Seabed Committee and into the complex and contested arena of international oceans politics (Nye 1975). By 1970, Argentina, Brazil, Chile, Ecuador, El Salvador, Nicaragua, Panama, Peru and Uruguay circulated a call for the UN member states to recognize that "any norms governing the limits of national sovereignty and jurisdiction over the sea, its soil and its subsoil, and the conditions for the exploitation of their resources, must take account of the geographical realities of the coastal States *and the special needs and economic and social responsibilities of developing States.*"[23] This statement crystallized a sentiment that some form of codified jurisdiction over a vast space beyond the territorial sea would be under the coastal state's authority, totally independent of its means to actually exploit the resources contained, under a principle of equity for the Third World. Such authoritative allocation based on geography not power (manifest in the form of capability to exploit and use ocean resources and space) is perhaps the central norm underlying the eventual EEZ regime (Dutton 2012).

By 1971, the writing was on the wall that an economic zone beyond the territorial sea would eventually become part of the law of the sea. At the twelfth meeting of the Seabed

[23] "Montevideo Declaration on the Law of the Sea," NV/185 (June 9, 1970), italics added.

Committee, Asian and African states found considerable common purpose in this endeavor, uniting in a pan-Third World sub-group, the Asian-African Legal Consultative Committee on the Law of the Sea. This group, a precursor to the G-77 group that would eventually dominate the Conference, concluded that "[v]irtually all states agree to some kind of exclusive jurisdiction in a zone adjacent to the territorial sea."[24] Caribbean countries followed suit in 1972 with a "Santo Domingo Declaration" that formulated the notion of a "patrimonial sea" in which the coastal state had specified "sovereign rights," a duty to promote and a right to regulate marine scientific research, a 200nm maximum extent of jurisdiction, and a carve-out for freedoms of navigation and overflight with "no restrictions other than those resulting from the exercise by the coastal state of its rights within the area."[25] That formulation balances the rights and duties of states quite strongly in favor of *closure* by granting coastal states discretion to define their rights within zones under their jurisdiction and, on this basis, regulate other potential users.

Defining the basic negotiating principles on this basis was fundamental to the Third World Effort to use legal norms to carve out space in the oceans that could not be subjected to the authority of advanced industrial states. The Santo Domingo statement made clear that this was an effort to "define, through universal norms, the nature and scope of the rights of states, as well as their obligations and responsibilities relating to the various oceanic zones, without prejudice to regional or subregional agreements, based on said norms." The emphasis on legal and practical norms in this statement reflects a clear interest in revising the international legal regime for the law of the sea, and in particular,

[24] United Nations Division for Ocean Affairs and Law of the Sea, Office of Legal Affairs 1992: 4, in "Report of the Subcommittee on the Law of the Sea (18-27 January 1971).
[25] *Ibid.,* 5, at Specialized Conference of the Caribbean Countries on the Problems of the Sea (9 June 1972).

for redefining its *scope* and *content* such that coastal states have universally recognized authority to enact their own laws and policies in ever-increasing maritime zones (i.e., creeping jurisdiction).

The steady movement toward closure in the EEZ took more specific, substantive form in a 1973 Declaration at Addis Ababa by the Organization of African Unity.[26] This declaration directly informed the content of the draft articles of the pending Conference to begin later that year. In it, African states drew on the accumulated efforts of the Third World to propose norms that would redress the prevailing circumstance under which resources were "constantly being exploited by only a few states" and grant "permanent sovereignty" to the coastal states over "all the living and mineral resources." Those states would enjoy unfettered rights to "manage the zone without undue interference with other legitimate uses of the sea; namely, freedom of navigation, overflight, and the laying of cables and pipelines."

This balance between coastal state management and flag state usage approximates the compromise struck at the Conference. It entails a wholesale replacement of the previous, liberal default norm, imposing geographically-based entitlements over once-unregulated high seas. Coastal states now enjoyed a specified group of sovereign rights that, in theory, did not infringe on various freedoms insisted upon by the maritime powers. Yet because the new dominant norm afforded the coastal state some discretion to determine

[26] A/Conf.62/33, "Declaration of the Organization of African Unity on the Issues of the Law of the Sea" (1973).

what type of management was required in order to protect and enforce its rights, the system was indeterminate and allowed states to pursue closure.

Pre-Conference Interactions: PRC Adopts Third World Norms

The PRC's stance on the law of the sea took shape only after it joined the UN in 1971, an interaction exposing it to Third World states' views on ocean issues and leading PRC representatives to greater appreciation of the demand for a new treaty. China's professed interests in the law of the sea were soon indistinguishable from those of Latin American and African states; the specific norms promoted by the PRC prior to and during the Conference were cut from the whole cloth of the various proposals by Third World. They were even justified within China on the basis of supporting the Third World struggle – not, indeed, as a function of any specific PRC interest in maritime jurisdictional issues.[27]

China's representative to the Seabed Committee, Shen Weiliang, made this orientation abundantly clear and professed total solidarity with Third World causes. He denounced the previous regime as "fundamentally in the interests of the superpowers in pursuing maritime hegemony and not to the advantage of the large numbers of developing countries in their just struggle to defend their sovereignty and national economic interests."[28] In this context, Shen confirmed that "the Chinese delegation firmly supports the opinion of the delegations of many small and medium-sized countries that at the third Conference on the Law of the Sea, a new and comprehensive convention should be worked out to replace the four Geneva conventions [i.e., UNCLOS I]. We are deeply

[27] See Beijing Review 1971: 13 for specific reference to the various Latin American claims that informed China's arguments in its early position papers.
[28] *Xinhua Weekly* 1973: 18

convinced that this will be in the interests of the people of all countries." His conflation of Chinese interests with those of small, weak countries is clear, though it bears closer observation whether the reality of their participation matches the rhetorical commitments ventured by PRC representatives.

To this end, we can analyze the three position papers the PRC submitted to the Seabed Committee in 1973 prior to the start of the Conference.[29] Each of these papers – one on the "limits of national jurisdiction, one on "general principles for the international sea area" and another on "marine scientific research" (MSR) – announced positions that were virtually identical to those of the Third World, as expressed in the series of declarations examined above. These positions would reappear in PRC statements throughout the negotiating process, espousing illiberal doctrine via indeterminate rules that permitted a norm of closure. In these respects, China's interests match those of the Asian and African states who led the drive to the Conference, and found expression in a fixed set of preferences that did not change throughout the negotiations.

The first of the PRC working papers discussed the "Sea Area within the Limits of National Jurisdiction," i.e., the emerging EEZ regime as well as the territorial seas landward of that new zone. It should be considered the first and most comprehensive statement of PRC principles regarding EEZ rules. The paper asserts that the scope and content of the EEZ should be determined by the coastal states in accordance with their subjectively assessed interests. The thrust of the PRC position in this first working paper

[29] A/AC.138/SC.II/L.34, Working Paper on Sea Area within the Limits of National Jurisdiction (16 July 1973); A/AC/138/SC.I/L.25, Working Paper on General Principles for the International Sea Area (2 August 1973); and A/AC.138/SC.III/L.42 Working Paper on Marine Scientific Research (19 July 1973).

parrots the statements and working papers of the Latin American and African states.[30] Subsequent PRC participation in the Conference negotiations led only to additional parameters placed on this unmistakable call for an illiberal regime that would allow individual states to promote closure at their own discretion, through indeterminate principles rather than precise, statutory rules.

The key issue at stake in the first working paper is the limit on coastal state jurisdiction over maritime zones extending from its coast, and China staked out a maximalist position on how that limit is defined and how much jurisdictional content can be claimed. Article I(2) of the working paper states that "[a] coastal State is entitled to reasonably define the breadth and limits of its territorial sea according to its geographical features and its needs of economic development and national security and having due regard to the legitimate interests of its neighboring countries and the convenience of international navigation." Article II(1) extends this same reasoning to the zones seaward of the territorial sea, stating that "[a] coastal state may reasonably define an exclusive economic zone…beyond and adjacent to its territorial sea in accordance with its geographical and geological conditions, the state of its natural resources and its needs of national economic development." The 200nm limit that had become normal in the later Latin American and African positions did not appear in this first Chinese paper, although eventually China

[30] Of particular influence on the content of the Chinese statement are EEZ draft articles from Kenya: UN Doc. A/AC/138/SC.II/L.10 (1972), 27 UN GAOR Supp. (No. 21) at 180, UN Doc. A/8721 (1972), then submitted as Revised Draft Articles on the Exclusive Economic Zone (submitted by Kenya), Asian-African Legal Consultative Committee, Report of the 14th Session (New Delhi, Jan 10-18, 1973) at 61; and the Santiago Declaration on the Maritime Zone (18 August 1952), *UN Treaty Series*, no. 14758, https://treaties.un.org/doc/Publication/UNTS/Volume%201006/volume-1006-I-14758-English.pdf. The language of the Chinese papers and statements were also constructed in such a way as to contradict the basic premises of statements by Japanese and (A/AC/138/SCII/L.12 188) and Soviet delegations (A/AC.138/SC.II/L.6 158).

fell into line with this emerging norm. The initial Chinese stance was even more broad and indeterminate.

Affording total discretion to the coastal state in determining the limits of its jurisdiction is a radical departure from existing norms in which the balance of rights beyond the territorial sea is held by user or "flag" states. Rather than strictly limiting jurisdictional zones to areas within a state's capacity to exploit or regulate, China's argument would determine the scope of a state's geographic control over maritime space on the basis of that state's subjective determination of its security and economic interests. The specific content of the rules within that scope, moreover, would also be entirely within the state's discretion. To this end, China's working paper claims in II(6) that "[a] coastal State may enact necessary laws and regulations for the effective regulation of its economic zone. Other states, in carrying out any activities in the economic zone of a coastal state, are required to observe the relevant laws and regulations of the coastal State." This indeterminate "domestic" principle – that the coastal state may regulate its jurisdictional zones entirely according to its lights, based on its subjective understanding of the law of the sea – underlies most of China's substantive positions throughout the Conference.

China's other two pre-Conference working papers telegraphed substantive positions that would later be elaborated by its delegates during negotiations. The paper on "General Principles for the International Sea Area" sketches Chinese views on areas beyond national jurisdiction – namely that they are "jointly owned by the people of all countries" (Article 1) as the "common heritage of mankind." China's vague position here later crystallized around the idea of putting economic activity in this non-sovereign area under

the auspices of the "Enterprise," an international body promoted by developing states to check the unregulated use of deep seabed minerals and other resources by maritime powers. This subject of deep seabed mining in the "Area" beyond national jurisdiction (i.e., the high seas) was a highly contentious one throughout and after the Conference (and also the ostensible reason for American non-accession to the treaty). It proved a red herring, as this activity has yet to become commercial. The stakes were always lower than those of the near-shore zones, but China's diplomatic efforts in support of Third World causes reflected the specific interests of those weak states in checking market-driven use of resources in all zones.

China's third paper, on "Marine Scientific Research" (MSR), advocates maximum discretion for coastal states to regulate activities of other states in their EEZs. Foreign use would be subject to "relevant [domestic] laws and regulations" as a function of the "sovereignty" of the coastal state within that zone. This conflation of non-exhaustive coastal State sovereign *rights* in EEZs and its unlimited *sovereignty* recurs in Chinese proposals and statements throughout the Conference proceedings. The black letters of the EEZ negotiated at the Conference plainly restrict coastal states to less than full sovereignty in this resource zone, but Chinese and Third World advocacy for a broadly-construed, indeterminate account of how those coastal state rights are constrained plays a big role in subsequent practice. In concert, the PRC's position papers telegraph the PRC delegation's desired role as a staunch advocate of Third World interests, and in parallel, a spoiler to the preferences held by strong maritime states.

Procedural Justice for the Little Guys

Discussion of the procedures by which the treaty would be drafted dominated early stages of the Conference. China weighed in consistently for an arrangement that would give maximal representation to the interests of the Third World and thus constrain the maritime powers' capacity to dictate substantive rules. To this end, the Chinese delegates argued strenuously to *limit their own privileges* as a UNSC member by engineering specialized committee leadership and composition, and general voting procedures that formally assured equal voice to all participants in developing the substance of the treaty. To law of the sea experts in the West, the Chinese contribution and its decision to caucus with the states of the Third World yielded a "complex, cumbersome and inefficient decision system" with "a high probability of official failure."[31] The unwieldiness of the process and its inability to produce a totally coherent text do not appear to have troubled Chinese negotiators, whose thoroughgoing commitment to opposing the "superpowers' maritime hegemony" in some cases led to contradictory positions.

(i) Committee composition. Drafting a treaty covering so many substantive areas required a determination of how specialized committee posts would be allocated among the different states negotiating the treaty. These committees were composed of representatives put forward by regional groups, which were formal caucuses known as the Asian Group, the Latin American Group, the African Group, and the Eastern European Group. An informal Western European and Others Group was considered a residual category and denied any special privileges on committees, a procedural disadvantaged locked in by the vastly superior numbers of the other regional groups.[32]

[31] Miles 1977: 159. See also Johnston 1975: 357-372; Friedheim 1993.
[32] Miles 1977: 163

China and others also insisted that a large group of non-states were admitted as observers and sat in committees.[33] Despite widely various interests based on their geography and levels of development, the G-77 group was able to maintain "ideological and political integrity" with strong encouragement from the Chinese delegation, who had Chairman Mao Zedong's explicit endorsement to promote Third World interests.[34]

(ii) One State, One Vote. Although UN decision-making has an undemocratic voting procedure that grants extraordinary privileges to the permanent members of the UNSC, the Conference established a one-state-one-vote rule over the persistent objections of American and Soviet delegates. In refusing to extend its own UN voting privileges into the law of the sea negotiations, China demonstrated remarkable commitment to defending the interests of smaller states at its own expense. The Chinese head of delegation, Ling Qing, disputed this point extensively with the French, American, and Soviet representatives, siding explicitly with the "Asian, African and Latin American groups [which] had indicated their support for that [one-state-one-vote] principle, a position which [the PRC] delegation endorsed in view of its long-standing conviction that all countries, large or small, should have equal rights and that no country, however powerful, should enjoy a privileged position at an international conference. It should be noted that only the two super-Powers were asking for more than one seat. That was an unfair and unreasonable manifestation of super-Power hegemony, which his delegation firmly

[33] See A/CONF.62/SR.98; A/CONF.62/L.29. Papua New Guinea, the Cook Islands, the Netherlands Antilles, Niue, Surname, the West Indies Associated States, and the Trust Territory of the Pacific Islands invited to the Conference and allowed to participate in drafting meetings, as were national liberation movements like the Organization of African Unity, the Palestine Liberation Organization, and the League of Arab States. These groups caucused with the Asian, African and Latin American groups as the G-77.
[34] Within months of the beginning of the Conference, Mao pronounced his theory of "Three Worlds" – see Mao 1974 and Miles 1977: 163.

opposed."[35] China's individual vote counted far less as a result of this procedural move. In its strong advocacy for this provision it made a costly concession that demonstrated far more than mere rhetorical support for the Third World agenda at the Conference.

(iii) "*Gentleman's Agreement" on Consensus.* Although equally apportioned voting rights were already intact from the first session of negotiations (in Rule 37), the question of the standards by which those votes would be counted in decision-making was hotly contested (Rule 39).[36] The argument over the required number or proportion of votes eventually produced an informal agreement, reached in desperation during the early stages of the second round of negotiations in 1974 in light of "the desirability of adopting a convention on the Law of the Sea which will secure the widest possible acceptance."[37] The aim of this so-called "Gentleman's Agreement" was to "make every effort to reach agreement on substantive matters by way of consensus…there should be no voting on such matters until all efforts at consensus have been exhausted."[38] Nominally, a majority rule prevailed over the American and European proposals for a two-thirds supermajority vote on the final text,[39] but the consensus rule was well-understood to be the agreed procedure.[40] No clear agreement was ever reached on the required majorities for specific substantive issues. The Conference had established the norm that the text would be

[35] A/CONF.62/4-14. See also A/CONF.62/ SR.4, A/CONF.62/2 and Add.1-3 for further discussion on this procedural point.
[36] Extensive discussion of these rules occurred during the first session of the Conference, A/CONF.62/SR1-13.
[37] A/CONF.62/WP.2
[38] UNGA 28th Session (1973) Supplement No. 21 (A/9021 and Corr.l and 3).
[39] Such a rule would have given American and other western negotiators more leverage to "divide and conquer" the large but diverse group of developing states, requiring only a small number to abandon solidarity with the Third World bloc and vote for their specific interests (as coastal states, landlocked states, major fisheries states, etc.). See Friedheim 1993; Chiu 1981 for detailed analysis of how different groupings' preferences over specific rules were (in theory) distributed.
[40] Center for Oceans Law and Policy 1985: 4

harmonized over the course of formal and informal committee discussions, meetings and consultations, obviating the need for a "showdown vote."[41]

China's desire for Third World solidarity and equity in the treaty was fulfilled, in the words of its delegation, because the "text would necessarily have to reflect the positions and interests of the majority of countries; in particular, it would have to be consonant with the interests of the developing countries, as voiced by the Group of 77."[42] This loose procedural arrangement could be construed to give *any* state a veto – including the maritime powers against whose will the various substantive provisions were being developed – and therefore negate the effect of the one-state-one-vote principle. But in practice, it meant that the agreed treaty would reflect the dominant role of the Third World throughout Conference drafting committees. China initiated neither of these procedural moves, but endorsed both without acknowledging their contradictory effects, standing on the principle that "the text should be drafted democratically and serious consideration should be given to the views of the developing countries."[43] It took this incoherent view with an eye towards supporting Third World interests, rather than its own narrowly-construed interest in maximizing its own voice.

(iv) Reservations to the treaty. In its one notable departure from positions borrowed from the Third World, China lobbied for the possibility of individual reservations to substantive provisions of the treaty. That is, it came around to the position that states should be allowed to become party to the treaty while taking exception to one or more of

[41] Chiu 1981: 12
[42] A/CONF.62/C.3/SR.21
[43] A/CONF.62/SR.78

its rules and stating an intention not to follow them – or, at least, to follow them with a particular interpretation that is not evident in the black letters of the treaty text.[44] PRC comments in committee and plenary sessions on this issue came only late in the Conference (1980),[45] when certain articles in the "single negotiating text" (SNT) that emerged from the drafting committees were insufficiently deferential to the interests of the developing world. China was especially adamant about reserving its domestic legal rights to regulate innocent passage and EEZ activities for military vessels, and was therefore unwilling to accept the contract as fully binding on its own practices.

Chinese delegates were disappointed by their failure to explicitly empower states to enforce domestic law regulating foreign military vessels in coastal jurisdictional zones, and stressed the need for reservations on that account. They argued that "provisions [articles 309 and 310 of the Convention][46] were tantamount to preventing States parties from expressing reservations which would not be incompatible with the principles of the convention in respect of articles affecting their essential rights and vital interests."[47] Although the final treaty text expressly forbids any state to make reservations that are incompatible with the Convention, the PRC did ultimately make declarations upon signature of the Convention that telegraphed its intention to practice the law of the sea

[44] The default rule for treaties is that states are free to make reservations to parts of a treaty, provided they are not "incompatible with the object and purpose of the treaty" (Vienna Convention on the Law of Treaties, 23 May 1969, 1155 *UN Treaty Series* 331).
[45] See in particular PRC comments during A/CONF.62/SR.126 and A/CONF.62/SR.135.
[46] These articles obligate states to bring its domestic law into line with UNCLOS. "Article 309 "Reservations and exceptions": No reservations or exceptions may be made to this Convention unless expressly permitted by other articles of this Convention; Article 310 "Declarations and statements": Article 309 does not preclude a State, when signing, ratifying or acceding to this Convention, from making declarations or statements, however phrased or named, with a view, inter alia, to the harmonization of its laws and regulations with the provisions of this Convention, provided that such declarations or statements do not purport to exclude or to modify the legal effect of the provisions of this Convention in their application to that State."
[47] A/CONF.62/SR.126

according to its own lights – especially where issues of coastal state discretion to apply its domestic law are concerned. This was a rare deviation from the interests of the Third World nations, who favored mandatory compliance by all states. It demonstrates China's even more prepossessing interest in maintaining sufficient indeterminacy such that it could "auto-interpret" the treaty in light of its illiberal principles and domestic laws.

(v) General move towards procedural obstruction. The variety and complexity of procedural points on which China expressed a view precludes comprehensive treatment,[48] but invites a general characterization of the motives underlying PRC efforts in this vein: it sought maximum voice for the Third World states participating in the Conference, and corresponding diminishment of the direct influence of the traditional maritime powers. The upshot of these efforts, given the overall composition of participants in the Conference, was a protracted debate about procedure that led to an unwieldy decision-making system. China lent unequivocal support to the many procedural hurdles thrown up by the various Third World delegates. These mostly illiberal states shared an indifference, or even aversion, to the technically sound procedure and precise, binding language preferred by Western delegates.[49]

These qualities of the PRC's interaction – and especially its preference for principled indeterminacy – should be borne in mind as the analysis proceeds through the Conference and into the practical implementation of treaty obligations. The procedural negotiation

[48] For example, China argued for an onerous credentialing process at each meeting (A/CONF.62/ SR.20), for representation from non-state "national liberation movements and organizations" (A/CONF.62/SR.25),
[49] One leading law of the sea authority remarked that the treaty did not employ "the kind of language that could have been drafted by the International Law Commission [as had previous UNCLOS treaties], nor indeed could the Commission have devised such a doctrinally confused regime" (Shearer 2014: 59).

was slow and cumbersome, matching the PRC's professed desire that "[t]he future convention would have to take account of the needs of all nations of the world, and sufficient time should therefore be allowed for consultations. No convention which reflected the one-sided interests of a few major Powers will be respected or last."[50]

Substantive Chinese Contributions: Indeterminacy, Illiberalism, and Closure

In consequence of the procedural system adopted by the Conference, the debates over substantive provisions were not only slow, but, in several key respects, inconclusive. The Chinese delegation steadily advanced the substantive goals first expressed in their pre-Conference working papers. These goals were best served by indeterminate treaty text that allowed maximum discretion to coastal states. This principled move toward indeterminacy is particularly evident in China's staunch support for closure of the EEZ through (i) balancing rights in favor of the coastal state, (ii) maximizing the scope of territorial seas (and archipelagic waters), (iii) curtailing traditional freedoms of the seas, especially for military vessels, (iv) advocating a strict regime for marine scientific research in the EEZ, and (v) resisting compulsory dispute resolution that might be used to clarify and enforce otherwise indeterminate rules.

To these ends, the bulk of PRC delegates' rhetoric at the Conference expounded on abstract principles, the source of no small frustration to Western delegates who prized determinate, coherent language and liberal norms. Much to the chagrin of the American delegation in particular, Chinese delegates repeatedly dragged their feet about what they deemed to be "premature consideration of specific or technical questions was not

[50] A/CONF.62/SR.70

conducive to progress," insisting that "important questions of principle should be allotted more time and considered on a priority basis."[51] Characteristic of future PRC statements and practice of the law of the sea, Chinese delegates generally avoided technical precision, favoring the more abstract goals of the Third World and "the principles to which they adhered—namely, the safeguarding of national independence, the equality of all States large or small, mutual respect for sovereignty and territorial integrity, and respect for the legitimate rights and interests of States."[52] This language is indicative of the overall thrust of Chinese contributions, calibrated to undermine the liberal system that enshrined maritime powers' rights to use and exploit maritime space, replacing it with an illiberal regime under which weaker states' authority could limit those freedoms.

Focus on such illiberal goals led to Chinese advocacy for a set of substantive positions that were neither well-adjusted to its particular geographic and strategic circumstance, nor readily practicable as a coherent set of maritime norms. The latter incoherence in critical aspects of the treaty is connected to PRC and Third World efforts to design a system that would cordon off vast areas of maritime space under domestic jurisdiction that would otherwise have been subject to the relatively liberal, international legal norms that prevailed prior to UNCLOS III. This stance centered on defeating the agenda of the maritime powers, a negatively defined goal that goes some way towards explaining the incoherence of many of their substantive positions. Countering great maritime powers' presumed manipulation of the Conference process emerged as a main operational goal for the PRC delegation, which characterized the alleged US and Soviet position as follows:

[51] A/CONF.62/C.1/SR.36
[52] A/CONF.62/SR.98

> It gave recognition to the 200-mile economic zone in words, yet insisted that the economic zone was a part of the high seas. It opposed the exclusive jurisdiction of coastal States over scientific research activities in the economic zone. It insisted that foreign military vessels need not give prior notification to or obtain authorization from coastal States for passage through the territorial sea and the straits lying within the territorial sea. It ignored the just proposals of the developing countries and refused to make compromises in substance, blaming the developing countries for lack of progress….The basic contradiction of the present work on the law of the sea was that, while the third world countries wanted to safeguard their maritime rights and interests, the one or two super-Powers were not reconciled to the loss of their privileged position of monopolizing the seas.[53]

Examined in detail, the PRC's substantive positions reflect a thoroughgoing commitment to negating the advantages that the existing open, liberal regime had allowed maritime powers to enjoy. At every juncture, their delegates espoused illiberal principles that allowed coastal states the discretion to promote closure on the basis of subjective determinations of their interests in security, economic development, and general protection of their sovereign prerogatives. These objectives are abundantly clear in the PRC contributions on a variety of subjects related to the emerging EEZ regime.

(i) *Supporting a balance of EEZ rights and jurisdiction that favors coastal states.* In discussing the EEZ (often called simply the "economic zone" while still in its nascent form during the Conference), Chinese delegates promoted authoritative allocation that negated market-driven advantages enjoyed by maritime powers. The unresolved tension between these norms emerged in the articles of Part V of the Convention. The text reflects a fragile compromise between constructing a zone as the extension of a coastal state's territorial waters (as preferred by China and the group of "territorialist" states) and leaving it as a part of the high seas with preferential rights carved out for the coastal state (the so-called "preferentialist" position favored by the Soviets as well as the US and their

[53] A/CONF.62/ SR.76

western European allies).[54] Ultimately, a third way – the so-called "zonist" position – prevailed in the text of the Convention. The EEZ regime defined specific jurisdiction and sovereign rights for coastal states, identified rights and duties for "user" (or "flag") states, leaving indeterminate the precise method for balancing the interests of coastal and user states.

This compromised design was effected by a deeply divided Second Committee, in which the many Third World states pressed their numerical advantage. The President of the Conference (a Sri Lankan) acknowledged it to be a concession to "the special character of this new legal concept (EEZ), which calls for a clear distinction to be drawn between the rights of the coastal State and the rights of the international community in the zone. A satisfactory situation must ensure that the sovereign rights and jurisdiction accorded to the coastal State are compatible with well-established and long-recognized rights of communication and navigation, which are indispensable to the maintenance of international relations, commercial and otherwise."[55] This question of "compatibility" between the rights of users and the rights of the coastal state under whose jurisdiction the EEZ falls was the crux of the debate. The "zonist" position did not so much resolve that debate as paper it over with indeterminate language pressed upon the committee by China and other Third World delegates seeking to undermine the liberal rights granted to all users. A regime lacking precise language would make "creeping jurisdiction" possible for coastal states seeking greater authority over this new ocean frontier.

[54] See Lupinacci 1984 for extended discussions of the various EEZ positions. These distinctions became clear in Conference discussions, especially in: A/Conf.62/L.8/Rev.1 (1974) Annex II, App. I [A/Conf.62/C.2/Wp.1] Provisions 88-123, III Off Rec 107, 120.
[55] A/Conf.62/L.12/Rev.1, Paras 11-13, VI.

China's contributions extended the positions it established in the pre-Conference period at the Seabed Committee, where it had acknowledged that the emerging EEZ beyond the territorial sea was not fully sovereign, but neither was it by default open to foreign use. A PRC representative argued that "other countries can engage in activities in the EEZ of a given country [i.e., the coastal state] only when they have secured its consent by concluding necessary agreements with it through consultations on an equal footing and on the basis of respect for its sovereignty."[56] This argument draws on the principle that the coastal state may use its discretion to advance some undefined set of interests – some of which pertain to its security and other subjective considerations, not merely those relating to sovereign rights over economic resources firmly established in the text.

For the Chinese, establishing the EEZ as a *sui generis* zone distinct from the unregulated high seas meant treating it as something like a territorial sea, an integral part of the state with only slightly attenuated entitlements to rights and jurisdiction. This aim manifested in PRC support for some of the more outlandish claims to 200nm territorial seas (by Peru and El Salvador), maximal bargaining positions that China endorsed due to its stated principle that the new one should "be delimited by each country in accordance with its legitimate needs and for the purpose of defending its national sovereignty, independence and resources. Some other developing countries favoured, for the same purposes, the establishment of a 200-mile territorial sea with different regulations for individual sectors of it."[57]

[56] Zhuang 1973: 7
[57] A/CONF.62/SR.55

The coastal state rights ultimately acknowledged in Article 56[58] sit uneasily with the flag state rights accorded in Article 58,[59] both of which appeal for "due regard" to the rights of the other without specifying how that regard is to be exercised in practice except in the indeterminate Article 59.[60] The method prescribed is basically ad hoc: "where this Convention does not attribute rights or jurisdiction to the coastal State or to other States within the exclusive economic zone, and a conflict arises between the interests of the

[58] UNCLOS III, Article 56 "Rights, jurisdiction and duties of the coastal State in the exclusive economic zone":

> 1. In the exclusive economic zone, the coastal State has:
>
> (a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds;
>
> (b) jurisdiction as provided for in the relevant provisions of this Convention with regard to:
>
> (i) the establishment and use of artificial islands, installations and structures;
>
> (ii) marine scientific research;
>
> (iii) the protection and preservation of the marine environment;
>
> (c) other rights and duties provided for in this Convention.
>
> 2. In exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention.
>
> 3. The rights set out in this article with respect to the seabed and subsoil shall be exercised in accordance with Part VI.

[59] UNCLOS III, Article 58 "Rights and duties of other States in the exclusive economic zone":

> 1. In the exclusive economic zone, all States, whether coastal or land-locked, enjoy, subject to the relevant provisions of this Convention, the freedoms referred to in article 87 of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention.
>
> 2. Articles 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part.
>
> 3. In exercising their rights and performing their duties under this Convention in the exclusive economic zone, States shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law in so far as they are not incompatible with this Part.

[60] UNCLOS III, Article 59 "Basis for the resolution of conflicts regarding the attribution of rights and jurisdiction in the exclusive economic zone":

> In cases where this Convention does not attribute rights or jurisdiction to the coastal State or to other States within the exclusive economic zone, and a conflict arises between the interests of the coastal State and any other State or States, the conflict should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole.

coastal State and any other State or States, the conflict should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole." The indeterminacy of this language reflects, in large part, the aggressive efforts spearheaded by China and other members of the "territorialist" group to forestall a complete accounting of the exact rights enjoyed by foreign users of EEZs and thus maximize the coastal state's discretion to recognize them on an ad hoc basis. This maneuver created a possibility that due regard for coastal state "interests" entails unspecified authority for closure according to domestic laws and regulations.

(ii) *Maximizing the breadth of the territorial sea out to 12nm.* The extension of "seaward" limits of the EEZ to 200nm was partially realized by the establishment of a territorial sea with a breadth of 12nm.[61] China enthusiastically promoted the Third World's efforts to expand the territorial sea to 12nm, far broader than the customary 3nm. This move had a direct effect on the EEZ, whose inner "landward" origins were correspondingly expanded. Even as they bargained away the maximal position adopted in the 1973 working paper on the limits of coastal state jurisdiction (that states determine the breadth of their own territorial sea), the PRC delegates remained staunch in the face of what they perceived to be "superpowers trying to impose a strict limitation on the breadth of the territorial sea. To them, the narrower the territorial sea and the wider the so-called high seas, the better, so that they could do as they pleased in the open sea."[62]

[61] See Koh 1988 for analysis of the shifting of the norm for a fisheries zone from 50nm to 200nm over the course of the 1970s.
[62] A/CONF.62/C.2/SR.48

Over the course of the negotiations, 12nm emerged as a consensus norm among the Third World States with respect to the breadth of territorial sea, and China joined ranks even as it maintained the principle that there was no determinate limit on the coastal state's discretion in this regard.[63] China's advocacy for that maximal principle, however, was among the factors that led to the adoption of a considerably broader territorial sea – a determination that the first efforts to codify the law of the sea at Geneva in 1958 and 1960 (UNCLOS I and II) failed to produce. The overall effect of this hard bargaining is reflected in the comment of the US representative in October 1979, who conceded that "it remains the firm position of the United States that a comprehensive convention on the law of the sea offers by far the best, and perhaps the last, opportunity to establish a universally agreed and conflict-free regime governing all uses of the world's oceans and their resources. We have indicated that, as part of such an agreement, we could accept a 12-mile territorial sea coupled with transit passage of straits used for international navigation, all within the context of the over-all package deal."[64] The Third World and their Chinese patrons exacted a painful compromise from the maritime powers in expanding the sovereign territorial sea well beyond its traditional limits.

(iii) *Curtailing traditional freedoms of the seas for military vessels.* Among a small number of very specific, substantive arguments consistently forwarded by Chinese delegates was opposition to military activities in coastal state jurisdictional zones. This entailed (1) a strict requirement for permission from the coastal state for warships to

[63] As late as 1979, when 12nm had been fully agreed, a Chinese delegate said it was "the basic position of his Government that no international law existed establishing a uniform limit to the breadth of the territorial sea, the delimitation of which was a matter of State sovereignty" (A/CONF.62/SR.118).
[64] A/CONF.62/92, statement by the representative of the United States of America in response to the statement by the Vice-Chairman of the group of coastal States contained in document A/CONF.62/90

exercise the right of "innocent passage" when transiting that coastal state's territorial sea, (2) a comparable restriction on "transit passage" for warships through international straits, and (3) some unspecified authority for coastal states to regulate military activities in EEZs. Collectively, these positions reflect the Chinese preference that the new Convention should grant vastly expanded authority to coastal states to limit the activities of this specific class of vessels on the basis of their infringement on subjectively-determined security interests of the coastal state.

Unrestricted freedom of action for warships was among the key sticking points for the maritime powers, and the records of the committee and plenary discussions bear out a stark debate on this question at many junctures. The Chinese were most vocal with respect to innocent passage (and ultimately made a signing statement to the effect that they would practice according to their minority interpretation about the right of innocent passage), and relatively silent on the other two except for the repeated assertion that warships, like other vessels, "should observe the laws and relevant regulations of the coastal States."[65] In the Chinese view, "[a] coastal State may, in accordance with *its* laws and regulations, require military ships of foreign States to tender prior notification to, or seek prior approval from, its competent authorities."[66] This provision for notification or approval under domestic law remained a Chinese reservation, despite its unequivocal defeat in the final text.

The substantive arguments China forwarded tended to leave ambiguous which rights the coastal state enjoyed in these zones, leaving open the possibility that coastal states could

[65] A/CONF.62/SR.25
[66] A/AC 138/SC II/L.34, italics added.

claim authority to limit free navigation of warships. The PRC delegation maintained that "[c]oastal States were entitled to define a territorial sea of an appropriate breadth and, beyond it, their exclusive economic or fishery zones with appropriate limits in the light of their specific conditions and the needs of their national economic development and national security. In so doing they should naturally take account of the legitimate interests of neighbouring countries and the convenience of international navigation."[67] The term "convenience" has no legal meaning, but serves as a minor concession to the established rights of user states upon which the new EEZ regime encroached. The overall thrust is towards maximizing coastal state discretion to enact a closed regime that could limit military use of maritime zones.

China opposed the maritime powers' purported view "that the exclusive economic zone under the jurisdiction of the coastal State was part of the high seas."[68] The high seas freedoms enjoyed in the EEZ, China claimed, should be radically limited by coastal state jurisdiction of indeterminate scope and content, as preferred by the Third World:

> The majority of developing and other countries favoured an exclusive economic zone not exceeding 200 miles and measured from the baseline of the territorial sea, to be delimited by each country in accordance with its legitimate needs and for the purpose of defending its national sovereignty, independence and resources. Some other developing countries favoured, for the same purposes, the establishment of a 200-mile territorial sea with different regulations for individual sectors of it. The proposals stemmed, in each case, from the same position, namely, the need to safeguard State sovereignty, oppose aggression, expansion and plunder by the hegemonic Powers, and defend maritime rights within a 200-mile zone.[69]

[67] *Ibid.*
[68] *Ibid.*
[69] A/CONF.62/C.2/SR.48

The Chinese and their Third World partners were not ultimately successful in achieving definite black letters that regulated the navigation of military vessels. This outcome was the result of maritime powers placing a high priority on "freedom of navigation," with the US leading this effort to anticipate the various strategic implications of new zones long before the Conference began (Hollick 1981). In one particularly telling declassified conversation, US National Security Adviser Henry Kissinger told President Richard Nixon in 1971, after several Latin American states began to claim 200nm zones, that "unless we tell them we're willing to negotiate the fisheries issue with them, they will have to start enforcing [their 200nm limit]….[I]f we don't do it [i.e., negotiate] on fisheries, the Latin Americans will oppose us on the more important issue of navigation, which comes up on the law of the seas [sic] conference later this year." Nixon, with characteristic charm, responds: "I don't give a damn about the fisheries anyway. Let everybody have 200 miles to fish. They're all poverty-stricken down there anyway….Navigation we want. Let them fish if they want."[70] Facing the concerted opposition of the maritime powers, who at least exercised a veto in the consensus-based process, the Chinese later took a more nuanced tack to close off EEZs from unauthorized use. This move enabled "creeping" coastal state jurisdiction into related functional regimes over which maritime powers were more inclined to negotiate.

(iv) *Augmenting coastal state jurisdiction over marine scientific research (MSR) in the EEZ.* The PRC's generic gripe about unrestricted freedoms for warships in coastal state zones took more substantive form in the discussions of the regime for MSR. The PRC joined Third World delegates in fighting to include a broader, less determinate class of

[70] U.S. Department of State, Office of the Historian 2005: Document 395

activities under the MSR designation. They lobbied to subject military intelligence, surveillance and reconnaissance activities that might be plausibly thought to contain a "scientific research" component to the strict regulation of the coastal state. While they did not succeed in establishing any defined coastal state authority over these activities, this effort to shoehorn non-economic interests – especially those concerning security – into the rights of coastal states in the emerging EEZ regime influenced the final, indeterminate text of the MSR provisions in Part XIII of the Convention (see Appendix B).

The Conference negotiations began with an assumption that the new EEZ would entail only *economic* rights, a parameter reflected in its name and in its enumeration of specific legal authorities for coastal and user states. Nonetheless, it presented a new conceptual container for legal authority – namely, "sovereign rights and jurisdiction," inferior to the plenary bundle of sovereign rights that constitutes sovereignty itself, but lacking a clear jurisprudential distinction. Chinese and Third World delegates sought to fill that container with more extensive and significant coastal state jurisdiction, largely by maintaining the principle that the state, rather than the user, would make a determination about whether or not the activity in question qualified as a regulated activity. This arrangement stood in contrast to the European-led objection to any need for coastal consent when the research in question was "unrelated to the exploration and exploitation of the living and nonliving resources of the [exclusive economic] zone."[71]

A PRC delegate explained the objection to this proposal on the grounds that it nullifies "the reasonable principle that, in order to safeguard their sovereignty and security, the

[71] A/CONF.62/C.3/L.26

coastal state's consent should be required for any MSR carried out in waters over which it has jurisdiction. It is impossible in practice to determine whether or not such research is related to marine resources. The pretext of scientific research is used by super-powers to undermine the security and economic interests of the many developing countries which are coastal states."[72] In short, the coastal state would have near-total discretion to classify any activities in its jurisdictional zones and to require compliance with its domestic rules on the matter. If competent authorities determined that there was an MSR component to the activity, they would be able to forbid or regulate it.

This is a concerted push for "creeping jurisdiction," and is evident in the bargain expressed in Article 56. That seminal article establishes a coastal state's "sovereign rights for exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, with regard to other activities for the economic exploitation and exploration of the zone." Those specifically enumerated rights are complemented by jurisdiction over artificial islands and structures, MSR, and protection and preservation of the marine environment. On paper, these articles constitute an exhaustive account of coastal state legal authorities in the zone – save for the carve-out for "other rights and duties provided for in this Convention" in Article 56(1)(c). The lens applied by the PRC and other developing states who sought to maximize the scope of their authority gave full play to this "other" category and the interpretative license they deemed it to confer.

[72] UA/CONF.62/C.3/L.13/REV.2

The Chinese delegation's stated views on this issue demonstrate general satisfaction with the text, which they felt supported their more closed interpretation of the MSR regime. The Chinese representative made this much clear when he stated that the PRC was taking what it viewed as a majority position regarding the principles underlying the new rules:

> [The PRC representative] associated himself with the views expressed on the issue of marine scientific research by the representatives of the United Republic of Tanzania, Brazil, Kenya and many other developing countries. His delegation was greatly encouraged by the positive efforts which many countries, especially those of the Third World, had made during the current session to find a reasonable solution to the issue. Nevertheless, he could not but note that the super-Powers were still clinging to their position of maritime hegemonism and opposing the exclusive jurisdiction of the coastal States over marine scientific research….Both the economic zone and the continental shelf were within national jurisdiction; accordingly, it was natural and proper that the coastal States should exercise their jurisdiction over scientific activities carried out in those areas….His delegation shared the view of many developing countries that it was essential to provide in that article that the coastal States should have "exclusive jurisdiction" in regard to marine scientific activities in their economic zones and that express consent should be obtained for such activities. Only then could that article serve as a basis for future negotiations.[73]

Indeed, the PRC felt their views had been vindicated in the black letters of the treaty, basing this interpretation on a presumption that the coastal state is within its rights to make ad hoc judgments about whether or not a given activity qualifies as MSR as defined in Part XIII of the treaty.[74]

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[73] A/CONF.62/C.3/SR.30

[74] UNCLOS III, Part XIII: Marine Scientific Research, Section 1. General Provisions:

> Article 238 "Right to conduct marine scientific research": All States, irrespective of their geographical location, and competent international organizations have the right to conduct marine scientific research subject to the rights and duties of other States as provided for in this Convention.
>
> Article 239 "Promotion of marine scientific research" States and competent international organizations shall promote and facilitate the development and conduct of marine scientific research in accordance with this Convention.
>
> Article 240 "General principles for the conduct of marine scientific research" In the conduct of marine scientific research the following principles shall apply:
>
> (a) marine scientific research shall be conducted exclusively for peaceful purposes;
>
> (b) marine scientific research shall be conducted with appropriate scientific methods and

As early as 1975, the Chinese recognized that these interpretive differences were producing an agreed text that reflected some fundamentally different views about how the law of the sea would function with respect to MSR and other important functional areas. The PRC delegation made this concern clear at several junctures, recognizing that the "struggle for international legislative power"[75] was not limited to the treaty's black letters and would require perpetual contestation in practice:

> The superpower which claimed to be the natural ally of the developing countries and professed to have their interests at heart adhered to the position that the area beyond the territorial sea was the "high seas" and that the exclusive economic zone under the jurisdiction of the coastal State was part of the high seas. It insisted on the so-called "freedom of scientific research" in the exclusive economic zone, alleging that it was unrelated to marine resources. It clung to the so-called freedom of navigation for warships in the exclusive economic zone and even in straits lying within the territorial sea of other States, and opposed the regime of innocent passage in such areas. It had never abandoned the worn-out doctrine of the freedom of the high seas, which was the core of the old law of the sea, and that was a clear manifestation of its desire for maritime hegemony. In such circumstances, how could agreement be reached, even though great efforts were being made by the many developing countries and by others?[76]

We may infer that China's delegation believed that the binding effects of treaty rules were probably limited. The practical meaning of the treaty would depend upon norms established afterwards, especially through the practice of great powers. The agreement reflected in the black letters of the text thus appeared to the PRC as falling somewhat

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means compatible with this Convention;
(c) marine scientific research shall not unjustifiably interfere with other legitimate uses of the sea compatible with this Convention and shall be duly respected in the course of such uses;
(d) marine scientific research shall be conducted in compliance with all relevant regulations adopted in conformity with this Convention including those for the protection and preservation of the marine environment.

Article 241 "Non-recognition of marine scientific research activities as the legal basis for claims"
Marine scientific research activities shall not constitute the legal basis for any claim to any part of the marine environment or its resources.

[75] Yuan 1984: 417-419

[76] A/CONF.62/SR.55

short of a binding contract, in that it did not specify determinate rights and duties in a way that was likely to uniformly influence all parties.

(v) *Resistance to compulsory dispute resolution that might be used to clarify and enforce otherwise indeterminate rules.* The Conference participants recognized this indeterminacy. Anticipating conflicts arising from differing views on the treaty's text, they created a compulsory dispute resolution system in Part XV to resolve questions of "interpretation and application of the treaty." This mechanism was a *part* of the treaty itself, an unusual and ambitious feature in a multilateral treaty.[77] This exotic condition reflects the Third World's realization that without such a compulsory mechanism, maritime powers might easily opt out of inconvenient rules.

In this respect, the PRC's view differed quite clearly from the G-77 consensus position. As a once-and-future great power, it perhaps anticipated smaller states use of legal adjudication and arbitration as a "weapon of the weak" and avoided endorsing this significant aspect of the final agreement.[78] Given that the PRC delegation held views about the meaning of various contentious provisions that were plainly at odds with those of some other delegates, they reasonably anticipated formal disputes about compliance with the new Convention. Specifically, the Chinese anticipated "problems within the scope of the State sovereignty and exclusive jurisdiction of a sovereign State" which they

[77] Typically, consent is given on a case-by-case basis for adjudication of treaty disputes. See Ginsburg and McAdams 2004 on this subject.
[78] Tao 2014 does not fully explain how China dealt with this feature of the Convention. Although they did, indeed, "opt out" of compulsory dispute resolution over a certain class of issues by way of an Article 298 declaration in 2006, they could not exempt themselves from arbitrations over other issues. The Convention creates a compulsory dispute resolution procedure that is binding for all State parties. China attempted to "reserve" the issue of compulsory dispute resolution when it ratified, but given the treaty's clear prohibition of this action, its reservation was legally meaningless.

continued to hold "should be handled in accordance with its laws and regulations. That was why [the Chinese] delegation considered that the provisions in document A/CONF.62/WP.9 concerning the compulsory jurisdiction of the law of the sea tribunal were inappropriate. Since the question of the settlement of disputes involved the sovereignty of all States, the procedures to be followed must be chosen by States themselves. If most States agreed to draft specific provisions on dispute settlement procedures, those provisions should not be included in the convention itself but should form a separate protocol so that countries could decide for themselves whether to accept it or not."[79] The Chinese were never reconciled to the idea that determinations could be made by third party arbitration, though this mechanism was firmly established in the Convention. They held, and continue to insist, that sovereignty permits states to exclude such legal measures and resolve disputes through "consultation and negotiation."[80]

Even one of the lone international legal scholars on the PRC delegation, Wang Tieya, in 1979 rejected "any compulsory and binding third-party settlement,"[81] though the PRC was obliged to accept it as part of the consensus deal that it duly signed in December 1982. Considered in light of the various substantive provisions in which the PRC's preferences for closure did not prevail in the text, this refusal could be reasonably expected to produce considerable legal difficulty and political friction once the treaty entered effect. The PRC's adamant refusal to participate in or accept the Philippines' law

[79] A/CONF.62/SR.60
[80] This view is expressed in the PRC's signing statement, analyzed in Section II.
[81] A/CONF.62/SR.112. In addition to Ni Zhengyu, Wang was the only international law scholar on the Chinese delegation (Kim 1987: 139). His 1981 textbook on international law remains the standard in Chinese law schools. Although his area of specialization was not the LOS, we can reasonably expect that his familiarity with Western scholarship law of treaties and their dispute resolution procedures was sufficient to recognize that the PRC had signed a treaty that made such resolution compulsory on all but a handful of exempted subjects.

of the sea arbitration, lodged in 2013 and completed in 2016, stands as a testament to the coherence of Chinese representatives' stance on this issue. Fuller analysis of that arbitration is warranted – but on its face, this objection reflects a consistent preference.

II. Post-Conference Assessment: Many Defects, But Close Enough

When China signed the treaty on the closing of the Conference in December 1982, its leadership expressed satisfaction that the Convention was "a victory in the long-term struggle of the Third World countries for equal maritime rights against the superpowers' maritime hegemony."[82] The maritime rights distributed by the text, however, could not be reasonably judged as "equal" in terms of China's relative benefit from the agreed regime. Indeed, given China's geography, demography, and maritime capabilities, the compromises for which it fought so diligently appear to put it at a severe disadvantage.

Assessing the damage: codified disadvantages

Chinese scholars still debate the success of PRC interaction at the Conference, but tend to maintain that it struck a beneficial deal. This leads them to cite the many provisions of the Convention in which PRC inputs were honored. One recent assessment touted the "correct lawful propositions" advanced by the Chinese delegation as influencing the articles on the territorial sea, the EEZ and continental shelf, the high seas, the international seabed area, marine environmental protection, marine scientific research, and dispute resolution mechanisms.[83] Indeed, the PRC's substantive and procedural

[82] People's Daily 1982
[83] Yu 2012: 55. He even names the specific articles upon which China purportedly exercised substantive influence: territorial sea: Arts 2-3, 15-16, 19.1, 21; EEZ and continental shelf: 55-58, 62.2, 69-70, 73, 77-79, 74.1, 83.3; high seas: 87, 92, 116, 118-119, 12; international seabed area: 136-137, 141-143, 145, 157-

contributions matched those of the large majority of developing states of the Conference, and consequently found their way into the treaty text.

Still, the many disadvantages codified in the treaty were not lost on the Chinese delegation, which in its closing statement lamented that "there are still shortcomings and even serious defects in the provisions of a few articles in the Convention. The Convention is not entirely satisfactory to us."[84] Five major sources of that dissatisfaction can be read from the black letters of the treaty and its negotiating history:

(1) Procedurally, China rejected an opportunity to use its UNSC seat to gain votes and committee memberships that would have allowed it substantially greater influence in drafting the treaty and engineering it to its own particular preferences. When, at later stages of the Conference, the text diverged from the original positions China presented in its working papers and from the consensus views of the G-77, China was not in a position to authoritatively demand changes.

(2) Geographically, as a state with only one oceanic border surrounded by enclosed and semi-enclosed seas, it received truncated EEZ (and continental shelf) entitlements. The continental landmass of China is immense, but its coastal frontage is comparatively short and surrounded by other states in close proximity. While Chinese experts typically calculate 14,000 km of coastline, and an additional 18,000 km from offshore islands,[85] foreign assessments generally measure China's coastline at 14,500 km. This figure omits

160, 170; marine environmental protection: 192, 194, 209-210, 213-218, 220, 23; MSR: 143, 242, 244-245; and dispute resolution mechanisms: 279-280, 283, 297-299.

[84] A/CONF.62/SR.191

[85] Yu 1995: 213.

long stretches of coastline because of the disputed sovereign title to of virtually all of those offshore islands.[86] The United States (19,924 km) and Japan (29, 751 km), by contrast, have open ocean flanks and longer coastlines that allow them to realize virtually all of their possible entitlements. Meanwhile, however optimistic the Chinese assessments of their territory, the Convention's EEZ guarantees that China is "zone-locked" by the EEZs of other states, and that its own EEZs are inevitably delimited at less than 200nm due to adjacent and opposite coasts less than 400nm away from Chinese territory. This is probably the most significant problem created by the Convention for the conventional, geopolitical view of Chinese interests.

(3) Economically, the Convention is plainly inferior to the previous regime as far as its Chinese welfare is concerned. For one, as a state with a large population and correspondingly large fishing fleet, it endorsed a new regime for the EEZ that closed off the vast majority of the world's fisheries under strong coastal state jurisdiction.[87] Chinese protein demands could not be met by the catch from its own jurisdictional waters even prior to the Conference, so a much more open regime that afforded first-come-first-serve access would have been materially far better for the Chinese than the alternative represented in the final text (Chiu 1975; Yuan 1984). China has no preferential access to other states' EEZs, which would have been open to its fishing fleet had the new regime not been so ambitious in scope and content. After all, coastal states enjoy *exclusive* rights and jurisdiction regarding the living resources of their EEZs, entailing substantial

[86] U.S. Central Intelligence Agency 2015, "Coastline"
[87] China's demand for fish was already among the world's highest throughout the negotiations, and has steadily increased since then. It employs some 15 million people in its fisheries industry, now by far the world's largest, and deploys the world's largest distant water fishing fleet. See Mallory 2013, 2015 for complete analysis of this phenomenon.

economic costs for the Chinese from any economic vantage. On oil and gas, the opportunity costs are greater in absolute terms: now well-capitalized and technically advanced Chinese offshore drilling capacity could be used throughout the world's oceans had the EEZ regime not been so closed.[88] Ironically, Chinese negotiators were among the main contributors to the very strength of those rights and jurisdiction, promoting authority for other states to limit China's economic access.

(4) Politically, the PRC accepted a system of maritime entitlements that gave large jurisdictional effects to islands. This was especially disadvantageous because of the four island groups over which China has territorial sovereignty disputes: the Spratlys, Paracels, and Scarborough Shoal in the South China Sea, and the Senkaku/Diaoyu islands in the East China Sea. By endorsing a regime that potentially created massive zones around these islands in the form of EEZs out to 200nm and extended continental shelves that might extend as far as 350nm, China's disputes became much more salient and invited other states to bargain harder for their claims (Nyman and Hensel 2008).[89]

(5) Strategically, China attempted but failed to introduce treaty rules that would unambiguously limit the access of foreign warships into jurisdictional zones. For all of its railing against "superpower maritime hegemony," China accepted a compromised treaty in which the freedoms of navigation and overflight were preserved. The indeterminate text with which that compromise is forged is the only consolation for the Chinese. Differences over the degree to which it grants sovereign states discretion to apply their

[88] Author interview with analyst at China National Petroleum Company (Beijing, June 2014).
[89] The discovery of substantial oil and gas resources in East Asia's littoral waters preceded the Conference, a fact of which Chinese negotiators were well aware but which evidently did not disrupt their preference for closure.

domestic law on this subject has subsequently led the PRC to "auto-interpret" the treaty to match their strategic interests. Further, given China's disadvantaged geographic position, the EEZ regime also created a circumstance in which Chinese warships would have to transit foreign zones in order to reach the high seas (i.e., "zone-lock"). They could reasonably expect that other states would enact reciprocal restrictions on PRC military access, another highly disadvantageous feature of the treaty from a strategic standpoint.

These "defects" and disadvantages were not lost on Chinese analysts at the time, nor are they ignored in contemporary discourse – even as China's practice of the law of the sea puts it into increasing conflict with its neighbors and powerful maritime states like the US. Ling Qing, the lead PRC delegate to later sessions of the Conference, published memoirs in 2008 in which he recounts his own recognition of some of the problems in the Chinese negotiating positions. He notes that the "big maritime powers" – namely the US, the Soviets and Japan – all benefitted handsomely from the 200nm EEZ, which gives the US far and away the largest entitlement and makes the "Japanese think they are the fourth biggest country in the world."[90] The Chinese delegation advanced the Third World's agenda of creating an the EEZ that could, in principle, limit the freedom of action of those maritime powers (thus "opposing the superpowers' hegemony at sea"[91]), but "we neglected to point out that it represented a redistribution of ownership rights of marine resources. Our understanding of this was apparently not thorough enough….[W]hen we first started out we did not fully investigate how the 200nm economic zone affected

[90] Ling 2008: 8
[91] *Ibid.*

China's own interests." Ling came to these views during the Conference, he claims, after consultations with a Latin American delegate who had emphasized how costly the regime would be for a state like China. Even with this awareness, however, Ling declined to redress the Chinese negotiating position for fear of creating the impression that he was "wavering in [his] politics and not resolute in supporting the 200nm rule."[92]

Decision to commit – with reservations

Whatever the "wavering" of some delegates over the manifest disadvantages of the treaty, it was obviously not sufficient to override the PRC's interest in ratification. We can understand this commitment only in terms of its interpretation of the relevant norms – specifically the degree to which China expected itself to be truly bound to the obligations it undertook by acceding to the Convention. Some evidence of this attitude came through clearly in the Conference discussions, and an even more emphatic proof of this normative view revealed itself in China's declarations upon finally ratifying the treaty in 1996 after most of its Third World colleagues had done so.

The PRC's formal declaration upon ratifying blatantly contravenes the black letters of the treaty itself by making reservations. The Convention, adopted as a package deal, expressly forbids any reservations that "purport to exclude or modify the legal effect of the provisions of this Convention in their application to that State" (Article 310). Yet, China's four-point statement conveys confidence that China will practice the law of the sea according to its own interpretation of the treaty:

[92] *Ibid.,* 7

(1) China reserved the right to delimit a 200nm EEZ as described in the Convention. This can be read to suggest that it planned to claim the full extent of the zone despite the inevitable overlap with the 200nm zones of other states. (2) China implicitly denied the compulsory jurisdiction of dispute resolution bodies in Part XV by electing to solve these inevitable delimitation problems "through consultations" with opposite or adjacent states. (3) China pronounced its sovereignty over disputed islands and archipelagos, making a territorial claim that was well beyond the solely maritime scope of the Convention. Describing those islands as "archipelagos" is also directly odds with the clear proscription of archipelagic status for states that are not wholly composed of islands.[93] (4) China reaffirmed its fervent opposition to the "innocent passage" regime established in the Convention, which lacked the PRC's preferred stipulation that "innocent passage through the territorial sea shall not prejudice the right of a coastal state to request, in accordance with its laws and regulations, a foreign State to obtain advance approval from or give prior notification to the coastal State for the passage of its warships."[94]

[93] China claims archipelagic baselines around these island groups, despite the fact that only states that are themselves archipelagic are entitled to close off the entire sea area around and in between their constituting islands: UNCLOS III, Part IV: Archipelagic States, Article 46, "Use of terms":

> For the purposes of this Convention: (a) "archipelagic State" means a State constituted wholly by one or more archipelagos and may include other islands."

[94] "In accordance with the decision of the Standing Committee of the Eighth National People's Congress of the People's Republic of China at its nineteenth session, the President of the People's Republic of China has hereby ratified the United Nations Convention on the Law of the Sea of 10 December 1982 and at the same time made the following statement:

> 1. In accordance with the provisions of the United Nations Convention on the Law of the Sea, the People's Republic of China shall enjoy sovereign rights and jurisdiction over an exclusive economic zone of 200 nautical miles and the continental shelf.
> 2. The People's Republic of China will effect, through consultations, the delimitation of the boundary of the maritime jurisdiction with the States with coasts opposite or adjacent to China respectively on the basis of international law and in accordance with the principle of equitability.
> 3. The People's Republic of China reaffirms its sovereignty over all its archipelagos and islands as listed in article 2 of the Law of the People's Republic of China on the territorial sea and the contiguous zone, which was promulgated on 25 February 1992.
> 4. The People's Republic of China reaffirms that the provisions of the United Nations Convention on the Law of the Sea concerning innocent passage through the territorial sea shall not prejudice

These reservations targeted some of the norms enshrined in the Convention that put China at a disadvantage. Some of the considerations underlying that decision to commit can be found in a 1996 statement by Vice Foreign Minister Li Zhaoxing, presented to the Standing Committee of the Eighth PRC National People's Congress.[95] He cited four principal reasons to do so: 1) to preserve and protect PRC "maritime rights and interests" and to "enlarge PRC maritime jurisdiction"; 2) to maintain "pioneer investor status" in deep seabed development; 3) to benefit from participation in UNCLOS by bringing PRC role in global maritime affairs into full play; and 4) because ratification will be useful in shaping a good image for the PRC. The first of these supposed advantages reflects the PRC's satisfaction that the treaty was sufficiently indeterminate to allow it to pursue closure in line with its interests. The latter two demonstrate its clear normative commitment to participating in a multilateral treaty process – that is, an interaction – that advanced its broader interests in supporting the Third World and exercising Chinese voice in shaping the international legal system.

PRC leaders, however, did not lack for misgivings. Li also cited four concerns in parallel to those benefits: 1) he noted a discrepancy between PRC domestic laws and regulations and those of UNCLOS regarding innocent passage; 2) he expressed concern about the influence of maritime boundary settlement on East China Sea delimitation; 3) he anticipated controversy over the South China Sea issue, especially the Chinese claims to

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> the right of a coastal State to request, in accordance with its laws and regulations, a foreign State to obtain advance approval from or give prior notification to the coastal State for the passage of its warships through the territorial sea of the coastal State." (UN Division for Ocean Affairs and the Law of the Sea, "Declarations and Statements" [7 June 1996], http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm)

[95] Zou and Song 2000: 308-309 (document on file with authors, discussed with both in interviews June 2014 and January 2015)

historic waters; and 4) he lamented the compulsory dispute settlement processes. These foreseeable costs are not a comprehensive account of all those facing China by committing to this treaty, but are indicative of the somewhat weak binding effects of treaty obligations on China's intended practice of the law of the sea.

China partially hedged its fourth concern (compulsory dispute resolution) ten years later, when it submitted an additional statement exercising its right under Article 298 of the Convention to opt out of certain types of compulsory dispute resolution, including boundary delimitation and issues involving military activities.[96] This was a puzzling delay given the delegation's vehement opposition to any such mechanisms during the Conference and its consequent vulnerability to arbitrations against it on issues like boundary delimitation and military activities, both of which it legally exempted in this later statement. This casual attitude about the binding provisions of the treaty regarding dispute settlement stands as further evidence that China did not expect that treaty norms would impose meaningful constraints on its practices.

III. Towards Interpretation

China plainly understood the various "defects" in the Convention, yet there was no public second-guessing of the decision to ratify and (nominally) comply with the treaty. The above account of the PRC delegation's interaction at the Conference demonstrates, at a minimum, that Chinese leaders in fact achieved many of their substantive and procedural

[96] Declaration made after ratification Declaration under article 298: "The Government of the People's Republic of China does not accept any of the procedures provided for in Section 2 of Part XV of the Convention with respect to all the categories of disputes referred to in paragraph 1 (a) (b) and (c) of Article 298 of the Convention."
UN Division for Ocean Affairs and the Law of the Sea 2006, "Declarations and Statements"

goals. At a minimum, they viewed accession as superior to the alternative of not joining the treaty. That purposive and fully-informed commitment reflects Chinese elites' belief that the treaty was in the PRC's national interest, despite its manifest disadvantages. The treaty evidently satisfied China's interests in an illiberal doctrine, its principled support for indeterminacy, and its specific preference for closure.

Conventionally understood interests do not adequately explain this interaction, which confounds expectations from power (that China was somehow coerced into an agreement that serves the interests of stronger powers); nor does the institution-centered account from contract (that it enabled some cooperative action unavailable without legal institutions) help us fully understand why China chose rules and norms that were worse than available alternatives. The story is potentially explicable under an approach from norms, but this analysis demands that we turn to the context that informed the PRC's interpretation of the treaty. This requires analysis of how PRC actors grasped the purposes of the interaction the Conference and assigned practical meaning to treaty norms thus created.

These interpretations are in large part a function of China's collective identity, an analytical subject that falls out of contract and power analysis but is essential for an account from norms. We need to ask how China (or, rather, individuals representing the state) determined the appropriate thing to do under given circumstances. The story of China's relationship to the law of the sea thus properly turns to an account of its historical relationship to the international legal system, its domestic legal traditions, its specific

experiences with maritime security, and its radical, revolutionary orientation towards the US-led order of the post-World War II era.

Chapter 3

China's Interpretation of the Law of the Sea: Rectifying the Unequal Treaties

> "International law is one of the instruments for settling international problems. If this instrument is useful to our country, to the socialist cause, or to the cause of peace of the people of the world, we will use it. However, if this instrument is disadvantageous to our country, to the socialist cause, or to the cause of peace of the people of the world, we will not use it and should create a new instrument to replace it."
>
> - *Renmin Ribao* [People's Daily], 18 September 1957

> "After World War II, The United States attempted to dominate the world and increasingly extended its activities from the sea surface to the sea bed and carried out expansion over vast areas….It dispatched its warships and vessels everywhere to intrude into the territorial seas and plunder the sea-bed resources of other countries and even commit outright armed intervention and aggression….[O]nly the superpowers have the final say, while the other one hundred and scores of countries in the world can only submissively obey….Can this be 'international law'?! It is a crude violation of the principle of state sovereignty. It is imperialistic logic, pure and simple."[1]
>
> - An Chin-Yuan, PRC representative to United Nations Seabed Committee

> "So far as our country is concerned, [international law] is an indispensable legal means to realize socialist modernization construction. For instance, in order to explore resources near our coast, we must study the legal status of the continental shelf, fishing zone and exclusive economic zone and international norms and customs between states in delimiting these regions….we must actively join international legislative activities and strengthen the struggle with the UN so as to form the broadest international united front for anti-hegemonism."[2]
>
> - Liu Fengming, from leading PRC international law textbook

The PRC's encounter with the law of the sea in the latter part of the twentieth century was only the latest in a long series of Chinese interactions with the "Western" system of international law. The third UN conference to forge a new law of the sea (1973-1982), however, was the very first instance in which the Chinese government played a prominent role in creating a multilateral

[1] An 1972: 654
[2] Liu 1982: 5

treaty constituting that system. Sitting in a newly-assumed seat on the UN Security Council (UNSC), China's voice was both significant and distinct from those of the other great powers. That voice was further amplified by the PRC's deliberately close association of its interests with those of Third World nations, who by the 1970s composed a majority in the UN General Assembly (UNGA). Even in a circumstance where the United States and the Soviet Union (joined by the rest of the UNSC permanent five, Japan, and other European powers) found an unusual common cause in opposing a challenge to the existing, liberal order of the seas, the Third World's sheer force of numbers was sufficient to create a new treaty. The "counter-hegemonic" support of the Chinese was essential to the adoption of a Third UN Convention on the Law of the Seas that radically transformed the maritime legal system.

"China's participation in UNCLOS was historically significant," according to a leading Chinese diplomat, in that it "marked new China's [i.e., the PRC's] first participation in international legislation."[3] China's evident contribution to the "legislation" enacted at the Conference, both in process and substance, was to advance the interests of the Third World. China's statements and positions at the Conference uniformly tracked those of the G-77 group (which represented some 120 Third World states) despite significant strategic, economic, and diplomatic reasons for distancing itself from the group's preferences. The PRC's positions did not change in any significant respect over the long and eventful period of negotiations in the UN Seabed Committee and eventual ratification (1968 – 1996), which spanned remarkable domestic political and economic changes in China. China's negotiators and experts recognized the costliness of

[3] Ling 2008: 1. Ling Qing was the head of the PRC delegation to some of the Third UN Conference on the Law of the Sea, and later PRC Ambassador to the United Nations (1980-1985). He is the great-grandson of the famous Lin Zexu, the Qing official who led China's opposition to the British Opium trade and was among the leading proponents of studying foreign "barbarians" and using their technologies and practices for Chinese ends (People's Daily 2000).

practical compliance with the specific obligations for which it advocated, yet proceeded with ratification anyhow. The treaty evidently satisfied a particular constellation of interests and preferences that PRC leadership interpreted to outweigh the manifest costs.[4]

We are left, still, with the question of why these were in fact China's priorities in the new law of the sea treaty. What are the sources of China's interests in illiberalism, indeterminacy, and closure? Why did China match its substantive and procedural preferences to those of the Third World? Beyond the PRC delegation's rhetoric about Third World solidarity and opposition to "maritime hegemony of the superpowers," the origins and intentions animating PRC positions remain obscure. This Chapter picks up where that analysis leaves off, with the question of why China arrived at this distinctive set of interests and preferences for the law of the sea.

That question is effectively one about China's *interpretation* of the treaty, both at the level of the individual rules and norms it promulgates, as well as at a broad level concerning the treaty's purpose and expected binding effects on Chinese practice. Through analysis of China's historical attitudes toward and practice of international law, this Chapter demonstrates that China's interpretation is best understood a product of its identity as a once-and-future great power with particular views about "Western," "hegemonic" international law. Those views bear the weight of a long "century of humiliation" on the wrong side of the "unequal treaty system," through which international legal agreements abetted Western domination of a weak China. The Chinese experienced the maritime aspects of that system as particularly pernicious, marked by repeated

[4] As detailed in Chapter 2, these may be summarized as: (1) consistent support for an *illiberal* doctrine underpinning the new regime by replacing the prior system of market-based maritime rights (i.e., first-come-first-served) with a system that authoritatively allocated rights on the basis of geography; (2) a principled campaign for *indeterminate* rules and procedures that grant maximal discretion to the sovereign states (to whom those rights were authoritatively allocated) to make domestic legal judgments about the extent of their own authority; and (3) a preference for *closure* as the basic norm in the EEZ, where China championed the Third World effort to radically expand the scope of the sovereign states' effective territorial boundaries and resisted efforts to dilute that authority.

seaborne invasions and resulting in special concessions granting European, Japanese and American maritime trade and access to Chinese coastal waters, ports and river systems. In consequence, another important feature of China's identity contributing to its positions on the law of the sea is a "maritime victim complex," with a corresponding perception of acute vulnerability to specifically *maritime* threats (typically from the Western powers and Japan). This perception tracks Chinese leaders' traditionally "continental" strategic orientation, based both in timeless geography and traumatic historical experience. Collectively, these facets of the PRC's identity, grounded in Chinese history, provide a rich explanation of why its leaders approached the interaction at the Conference with such unconventional goals and interpreted its meaning in such a distinctive fashion.

Given the Chinese historical experience and cultural-institutional context, we have no reason to privilege a default position that the rules are considered legitimate. The assumption that international law enjoys near-universal legitimacy is a theoretical leap that is often smuggled in without particular scrutiny, but which should be questioned directly—especially in the case of China. Legitimacy, in this study, is a subjective quality of a rule, norm, process, or institution that endows it with a sense of "oughtness" or normativity. Independent of any coercion or material self-interest, legitimacy can incline an actor to make a choice to obey a given rule – even one that puts it at a disadvantage – because that actor accepts his obligation to do so.[5] There are historical and cultural reasons to doubt that China accords a great deal of legitimacy to international law; in fact, this Chapter goes to great lengths to demonstrate a profound Chinese sense of the *illegitimacy* of "Western" international law, and a correspondingly cynical belief

[5] See Hurd 1999 for a careful analysis of how legitimacy operates as a mode of social control distinct from coercion and self-interest.

that it is used only instrumentally. If we accept the theoretical premise that "the basis of obligation is located anterior, not only to individual rules of international law, but even to the processes that give rise to those rules,"[6] then we need to understand how China interprets those processes and the rules to which they give rise. How have those processes, in the form of China's historical experience as a "victim" of international law, shaped Chinese identity? What have Chinese leaders learned about how to operate in a system dominated by Western powers whose international law reflects a cultural and institutional context that differs substantially from that of the Chinese? The mere fact that Chinese decision-makers do not accord a high priority to obedience to international law as an obligation does not mean they do not value law as an instrument to be wielded in practice.

This Chapter therefore establishes an account of the maritime dimension of the PRC's identity and corresponding interpretation of the UNCLOS III treaty. Part I examines China's historical attitudes toward international law, both traditionally and in the era of Marxism-Leninism. Part II explains China's specific encounter with the law of the sea, and its perception of special vulnerability to maritime security threats. Finally, Part III reintegrates this account of identity into the performance of the PRC delegation at the Conference and beyond, exploring the domestic and international political context that colored China's specific preferences for the EEZ. This domestically-oriented, inductive account of China's interpretation of UNCLOS discovers consistently instrumental Chinese views about the purpose of the treaty, and modest expectations about the extent of its impact on China's sovereignty and freedom of action. A concluding section signals the need to press further into the transnational legal process to

[6] Byers 1999: 7

examine into how these interpretations become legally and politically meaningful as they find their way into Chinese practice, by way of internalization and implementation.

I. China's Interpretive Frames: *Li*, Lenin, and the Unequal Treaties

The small PRC delegation[7] to the first full session of the Conference arrived in Caracas, Venezuela in June 1974 with a great deal of baggage. They carried not just suitcases, but a heavy burden of hostility against virtually the entire existing body of international law – the law of the sea in particular. Standard treatises on the law of the sea or textbooks on public international law were almost certainly not weighing them down, as they were traveling from a China in which such books and their formal study had been banned for the last eight years of Great Proletarian Cultural Revolution.[8] The Chinese representatives' rhetoric throughout the Conference was often bombastic and grandiose, decrying the "hegemonic superpowers monopoly over the high seas," while celebrating the glory of the Third World's struggle to wrest back sovereignty and dignity from the malign forces of "colonialism, imperialism and hegemony."[9] Protests over the illegitimacy of the existing law of the sea regime, and embrace of China's identity as a non-Western, post-colonial, socialist state were frequent tropes in PRC statements.

The delegation's preferences over substantive and procedural aspects of the treaty must be considered in light of this interpretive attitude. They demonstrated little interest in securing treaty terms that advanced PRC security and wealth, preferring to co-opt Third World positions on

[7] The MFA archives were closed to researchers during my period of fieldwork in China (April 2014 – March 2015), but author interviews with an MFA official (Beijing, November 2014) confirmed that the group started around a dozen, then added members throughout the negotiating rounds, reaching as many as 20.
[8] The "Great Proletarian Cultural Revolution" ran from 1966 through Mao Zedong's death in 1976, and among other radical aspects, led to the shuttering of PRC universities and law schools.
[9] A/CONF.62/SR.25; this is representative of most of the delegates' remarks during the Conference, which are dealt with at length in Chapter 2.

substance that were ill-suited to its geographic and political circumstances. These disadvantages were secondary to Chinese efforts to secure the following: (1) the *illiberal* doctrine of the new regime (such that it would broadly curtail the prior freedoms of strong maritime powers), (2) the *indeterminacy* of the rules and the procedures for applying them (such that sovereign states would exercise discretion over their implementation), and (3) the substantive norm of *closure* (such that the balance of rights under those indeterminate rules would go to the coastal state). China's revealed interest in promoting these qualities in the new law of the sea reflects the PRC delegates' interpretation of the purposes and function of international law in general, which informed their specific concerns about how the law of the sea would bear on threats to China's maritime security and development.

While the precise content of the delegates' beliefs and its relationship to their behavior cannot be determined from their statements, we can infer a great deal about the factors that framed their interpretation of the Conference and the treaty it produced. With focus on the system of legal and political education these men received, and attention to the organization and mission of the bureaucracy and party apparatus in which they were embedded, significant conclusions can be drawn about the ways the PRC delegates and their superiors approached the law of the sea. The cultural-institutional context in which they acted and recognized their identities, and the historical experiences which shaped their organizations and roles are relevant factors in a discussion of how they interpreted the purpose and function of the law of the sea.

This section first analyzes traditional Chinese attitudes toward international law during the imperial period, then offers a stylized account of the attitudes developed by modern regimes, as

represented in diplomatic practice, as well as in leading textbooks and educational materials commenting on the power and class elements of international law.

Law and *Li*: Traditional Chinese Attitudes Toward (International) Law

Long-standing Chinese practice and attitudes about international law shaped the training and professional roles of the Chinese elite involved in negotiations at the Conference, and more importantly, informed decision-making in Beijing regarding how China would interpret the regime. We need not equate their interpretations with some timeless "Chinese" view of international law to appreciate that traditional attitudes are a part of Chinese actors' basic identity vis-à-vis international legal institutions and processes. On balance, their conception of China as a victim of international law that was used as an instrument by malign foreign powers makes it more likely that Chinese actors would reject the legitimacy of the process and rules surrounding the law of the sea. In fact, a strong bias towards the illegitimacy of international law pervades Chinese doctrine on the subject, rooted both in classical conceptions of the appropriate function of international law in statecraft and in China's generally unfortunate encounters with Western international law. This context is an important prior consideration in explaining how illiberalism and indeterminacy came to dominate PRC contributions to the law of the sea; it also begins to explain Chinese expectations about the instrumental function of international law in general.

Illiberalism is a defining feature of the imperial tradition; it also pervades the governance and ruling philosophy of both major Chinese regimes during the twentieth century, the Kuomintang (KMT) Party of the Republic of China and the Chinese Communist Party (CCP) of the PRC. Modern Chinese leaders "inherited a set of institutionalized attitudes and historical precedents not easily conformable to the European tradition of international relations among equally

sovereign nation states."[10] Rather, Chinese statesmen applied to international affairs the same principles that applied internally. Most relevant to this analysis is the Confucian-oriented view that hierarchical relationships among different actors in society are the basis of order. Law was but one of several institutions expected to regulate those hierarchical relationships, and was highly limited in the scope of social affairs in which it had legitimate application.[11]

Indeed, law in imperial China "did not enjoy the prestige and importance that it gradually attained in Western countries. In China, it was not regarded as a major social achievement and a symbol of rectitude, but rather as a regrettable necessity, principally an instrument to be used by the state to enforce its will upon subjects who had not submitted to other means of social control."[12] Law did not confer rights upon individuals to be enforced against the state and thus limit its arbitrary authority, as it does in the liberal ideal.[13] Proficiency in law and legal administration was not among the prized qualities for bureaucrats, and was not part of the imperial examination system that determined the professional outlook for all state officials.[14]

The illiberal quality of China's legal affairs is perhaps their most distinctive feature from the standpoint of Western legal theory. The rules were dictated, amended, and abridged by the emperor and his magistrates without procedural checks and "were not framed in terms of individual rights and equality. Instead [law] largely buttressed the authority of the imperial

[10] Fairbank 1968: 4
[11] See Alford 1984 for a particularly nuanced discussion of this prevailing view, with some caveats. Chiu and Cohen 1974; Cohen 1967; deLisle 2000, and Potter 2013 all advance some version of this claim.
[12] Chiu and Cohen 1974: 17
[13] "…[I]n China, perhaps even more than in most other civilizations, the ordinary man's awareness and acceptance of such [legal] norms was shaped far more by the pervasive influence of custom than by any formally enacted system of law. The clan into which he was born, the guild of which he might become a member, the group of gentry elders holding the informal sway in his rural community - these and other extra-legal bodies helped to smooth the inevitable frictions in Chinese society by inculcating moral precepts upon their members, mediating disputes, or, if need arose, imposing disciplinary sanctions and penalties" (Bodde 1963: 375-376).
[14] Alford 1984: 1193

government and family. The law accorded vastly different treatment to persons depending on their relative statuses, with the most crucial distinctions being those of ruler-subject, husband-wife, and father-son."[15] The foundational norms of equality and procedural fairness that inform so much of Western legal doctrine are not only absent in the Chinese tradition, but inverted. Hierarchy is the foundation of order, in this view, and the appropriate obligations and attitudes of subjects of the emperor flow from correct practice of those hierarchical relationships. Processes for implementing law are subject to the arbitrary discretion of the hierarchically-superior actor, who is constrained only by his sense of propriety and expectation of efficacy.

The preferred institution for regulating social relations was *li* (礼), which "refers to the use of moral rules to regulate individuals…[including] all aspects of behavior and social position ranging from politeness and propriety to social status. *Li* establishes rank (or unequal status) between people."[16] *Li* is typically counterposed with *fa* (法), which is comparable to the Western notion of criminal law – punishments to be applied by the state in cases where *li* had been insufficient. Law's principle function thus lay at the very far end of the spectrum of governance, tending to be invoked only in criminal (rather than civil or administrative) cases.[17] Punishments tended to be severe and non-uniform, inflicted publicly for purposes of deterrence and calibrated not only on the basis of statutes, but on the relationships among the plaintiff and defendant and

[15] *Ibid.*, 1195
[16] Pan 2011: 234
[17] Chinese scholars rank "various instruments through which the state might be administered and social harmony maintained into a hierarchy ranging downward in desirability from heavenly reason (*tianli*), the way (*dao*), morality (*de*), ritual propriety (*li*), custom (*xixi*), community compacts (*xiang hue*), and family rules (*jia cheng*)" (Alford 1995: 10).

the discretion of the local magistrate. In general, "*li* is persuasive, preventive and enforced by social sanction, while *fa* is compulsive, punitive, and enforced by legal sanction."[18]

Li was the Confucian ideal, with *fa* representing only a last resort in cases where actors in society did not appropriately self-regulate.[19] Meanwhile, *fa* was the preferred instrument in the "Legalist" school, which saw legal punishment as the appropriate mechanism for regulating a disorderly society that would function best under coercion. Although the schools of Legalism and Confucianism competed for prominence in imperial governance, the Confucian model of stable social relations guided by cultural norms defining virtue remained the ideal – and probably remains so, despite the radical upheaval of the nineteenth and twentieth centuries. Traditionally, at least, "*li* was upheld as creating and maintaining a harmonious relationship while *fa* was criticized as disrupting peaceful relations….*Fa* just functions as a supplement to *li*."[20] Law was "neither the primary instrument for ensuring that people genuinely understood what was expected of them nor a means for encouraging rulers to discharge their responsibilities in a suitable fashion."[21] Rather, the law was an adjunct, at best, to a diverse array of governance tools developed over the long and varied course of Chinese imperial history. The relationship of the rulers to the ruled was not defined on a contractual basis, as it was in the theories that prevailed in Europe; rather it was defined normatively, on the basis of collective, cultural knowledge that determined and even institutionalized appropriate relationships.

[18] Pan 2011: 234
[19] A commonly-cited saying attributed to Confucius goes: "Lead the people with governmental measures and regulate them by law and punishments, and they will avoid wrong-doing, but will have no sense of honor or shame. Lead them by virtue and regulate them by the rules of propriety [li] and they will have a sense of shame and, moreover, set themselves right" (Alford 1995: 20).
[20] Pan 2011: 236
[21] Alford 1995: 20

Traditional Li Meets Modernity under the Unequal Treaties

This relatively narrow conception of the function and scope of law was equally applicable in the international domain. Formal equality among sovereigns was an entirely foreign concept, as was the very notion that there was a legitimate basis for political authority beyond the emperor. Formal *inequality*, i.e., hierarchy, was in fact the ordering principle (Kang 2007, 2010). By virtue of his status as "Son of Heaven," the emperor was the origin of all political authority, not only in China, but throughout the world: "lesser rulers acquired legitimacy, at least in Chinese eyes, only after investiture by the Chinese emperor."[22] The hierarchical relationships ordering domestic society extended to nations on China's periphery – a system of "tribute" in theory, if not always in practice (Cohen 1967; Fairbank 1968; Wang 1990a). This presumption was under threat from the beginning of large-scale European trade in the region in the sixteenth century, and was probably defunct by the time of the First Opium War (1839-1842) during which the Qing dynasty suffered the first of a series of major military and commercial defeats to foreign powers. Following these defeats, the waning Qing Empire accepted Western terms for trade and granted them substantial political and legal autonomy on Chinese territory. These arrangements were formalized in treaties, most plainly signed under duress.

These "unequal treaties" not only ceded to Europeans, Japanese, and Americans both permanent and leased concessions to as many as ninety-two "treaty ports" along China's eastern and southern seaboard, but also created a legal regime of extraterritoriality without any reciprocal access granted to the Chinese in those countries. [23] The terms of these treaties became more

[22] Cohen 1973: 475; see also Peerenboom 2004: 40-43

[23] Some estimate the total number of treaty ports as sixty-nine (Wang 1991: 257); others figure it reached ninety-two by the early twentieth century (Cassel 2012: 5). Other states with "unequal" privileges in China included Peru,

onerous over time, as foreign states matched and exceeded the stipulations of prior agreements. The U.S., joining the enterprise in earnest only after the Spanish-American War of 1898, negotiated an "Open Door" such that all foreign nations would enjoy equality of rights (most-favored nation status) within the various "spheres of influence" carved out by England, France, Germany, Japan, Italy, and Russia over the course of the nineteenth century.[24] There was indeed a hierarchical order in China during this period, but not one that maintained the Qing emperor's position at its pinnacle. The imperial court did not recognize the legitimacy of this system, with its imposition of norms and principles at odds with their traditional hierarchic order. This cultural-institutional context is also generally believed to have hindered Chinese actors' capacity to fully appreciate the practical implications of signing away legal rights. In any event, these unequal arrangements were generally imposed after military defeats, so Chinese officials had little choice but to accept.

Standard conditions in China's unequal treaties included not only the outright acquisition of Chinese territory conquered in battle, but far-ranging provisions for consular jurisdiction over specific territory and foreign individuals, naval and commercial access to coastal ports and river systems, recognized foreign courts and police to administer and enforce foreign law, permanent military presence in key points surrounding Beijing (and corresponding prohibitions from those zones for Chinese imperial forces and destruction of fortifications), various payments and indemnities for damages, rights to use foreign currency, rights to proselytize and educate, and

Mexico, Brazil, Belgium, Switzerland, Sweden, Norway, Portugal, the Netherlands, Spain, and Austria-Hungary (Wang 1990b: 241, 252).

[24] United States Library of Congress 1968: "Commercial Rights in China ('Open Door' Policy): Declarations by France, Germany, the United Kingdom, Italy, Japan and Russia accepting United States proposal for 'open door' policy in China, September 6, 1899 – March 20, 1900," 278-295; see also Wang 2005.

fixed low-tariff rates.[25] The Qing court acceded to this litany of unequal provisions and was in no position to renegotiate from strength at any point during its decline throughout the nineteenth century. The extra-territorial rights enjoyed by foreign powers no doubt hastened that process.

Chinese historiography on this issue is uniformly critical, tending to draw the same conclusions and list the same facts without citation. Estimates vary as to the exact number of such unequal treaties – some figure over 1,000, others place the figure at 745, and others at 500.[26] The accounting issue arises in large part because the major treaties following the First and Second Opium Wars (1839-1842 and 1858-1860), the Sino-Japanese War (1894-5), and the Boxer Rebellion (1900) were followed by a host of subsidiary agreements with other states capitalizing on those treaties, adopting their terms and imposing additional stipulations. In addition to these public instruments, Chinese sources estimate over 1,000 private contracts were linked to unequal treaty terms, concluded between the nationals and firms of the treaty states and Chinese government and commercial entities.[27] These treaties codified a set of formally unequal political, military and commercial relationships between the Chinese and foreign states.

Instrumental Adoption of International Law: Using the Barbarian to Check the Barbarian

Through the unequal treaty regime, the Qing and their successors were compelled to accept that foreign governments and their citizens were subject to only very circumscribed Chinese authority throughout Chinese territory. Among many strategic, economic, cultural and political consequences of this "century of humiliation," China's elite developed a particular conception of the function and purpose of international law. It differs from the uniformly critical attitude of

[25] Wang 1991: 252-253
[26] See Wang 2005: 2 at fn 3-5 for review of this literature.
[27] Wang 1990b: 248

rejection found in much of the post-colonial world, in part because China was only "semi-colonized" and its social and political institutions stayed reasonably intact through major periods of foreign encroachment. More substantive engagement with foreigners, largely on their terms, led to gradual institutionalization of methods to "use the barbarian to check the barbarian" – that is, borrowing the barbarian's repertoire of international law and using it as an instrument to limit their domination over Chinese society.[28] China's intellectual, military, and economic elites attributed the nation's weakness in part to superior Western technologies and institutions, and took particular note of Japan's success in adapting these tools to a Confucian society.[29] Reformers encouraged "rights consciousness" and recognition of the grim reality that Chinese conceptions of legitimate order were no longer practicable.[30]

China's encounter with international law upset traditional, hierarchical modes of diplomacy. Where the tribute system operated on the basis of imperial rules about how foreign delegates were to conduct relations within Chinese territory, the succession of nineteenth century defeats and unequal treaties made it necessary for the court to accept foreign diplomats and trade legations on the basis of different norms. The Chinese response to these external pressures

[28] This became a hallmark of Chinese thinking about how to manage foreigners and leverage their superior technologies and organization, reflected in the notion of 中体外用, or keeping China's core while utilizing foreign tools. The original formulation of "using the barbarian to check the barbarian" was developed by the late Qing reformer Wei Yuan, in perhaps "the first significant Chinese work on the West" (Hao and Wang 1978: 148). Yuan drew on research by an earlier Qing official, Lin Zexu, to create an "Illustrated gazetteer of the maritime kingdoms" in which he exhorted the late-Qing government to use international law (and other knowledge of the ways of foreign states) "for the purpose of using barbarians to attack the barbarians, using barbarians to negotiate with the barbarians, and learning the superior techniques of the barbarians to control the barbarians" (Alford 1984: 1180 at fn 9)

[29] Howson 2009: 821

[30] The influential reformer Liang Qichao wrote several colorful essays on this subject, speaking at the turn of the twentieth century about "formless, psychic pain that [a Chinese person] feels on being invaded, oppressed, or insulted [by deprivation of rights]. Others have misunderstood the true characteristic of rights, believing that it involved nothing more than the continuous calculation of physical, material benefit. Ah! Isn't that despicable? This is the opinion of superficial people. For instance, suppose I have an item that I took from another by force. The one whose item was taken will angrily resist [my appropriation] in court, wherein his goal is not [attaining] the thing itself, but [attaining] sovereignty over the thing" (Liang 1989).

included the creation of a new foreign office on the European model in 1861, the *Tsungli Yamen* [总理衙门] or General Administration Office. The officials in this new organization studied foreign texts on international law[31] and advised the court on the foreign practice of conducting relations on equal, rather than hierarchical terms, with other states. Remarking on an influential text in circulation among Chinese intellectuals in the 1860s, representatives from the new foreign office told the emperor that "your ministers find that although this book on foreign laws and regulations [i.e., Wheaton's *Elements of International Law*] is not basically in complete agreement with Chinese systems, it nevertheless contains sporadic passages which are useful."[32] Beliefs about appropriate *li* were in tension with the normative bases of Western legal theory, which drew its legitimacy from natural law tenets of Christian and, later, liberal provenance. Yet to the extent the norms, however illegitimate, had practical value, the Qing and later Chinese regimes made efforts to learn and utilize them in diplomacy.

The instrumental value of international law was easily recognizable to the small cohort familiar with Western practices, though its practical implementation was difficult to integrate into China's existing diplomatic repertoire. The new class of diplomat-officials were the first to engage with foreign powers according to international protocols favored in the West, and which hinged on a norm of formally equal relationship among sovereign entities. As a new organization appended to an imperial court committed to maintaining at least the pretense of hierarchical Chinese superiority, they lacked internal prestige and autonomy (Fairbank 1968; Chiu and Cohen 1974). Furthermore, their diplomatic maneuvering room was badly constrained by Chinese weakness and the liabilities inherited from the existing stock of unequal treaties. Lack of

[31] Most influential was a translation of Henry Wheaton's *Elements of International Law* undertaken by the American Presbyterian missionary W.A.P. Martin.
[32] Cited in Wang 1990b: 234

expertise compounded these difficulties: international law was not introduced into Chinese curricula until 1879, when the Beijing College of Foreign Languages opened the first school for legal education and enrolled nine students to specialize in international law.[33] With these institutionalized disadvantages, Chinese students learned to treat international legal agreements as a kind of "defensive weapon," a weak substitute for powerful diplomacy but still "the only way to maintain 'peace' with Western powers and protect its interests."[34] The peripheral nature of international law to the core of Chinese education on politics and statecraft persists into the present (Minzner 2013).

Predictably, the new Chinese foreign office did not wield the new instrument for conducting international relations with much success. Indeed, probably the "most glaring example of Chinese unequal treaties"[35] came as late as 1915 when Japan issued its "Twenty-One Demands" to the barely-sovereign ROC. Although the Americans and British helped mitigate some of the more extreme wartime claims of expansionist Japanese military-industrial power (especially its bid for outright cession of the Shandong peninsula), China was not able to prevent massive legal disadvantages from accruing well into the Republican period. Only in the 1920s did the concept of "unequal treaties" gain widespread currency. Their abrogation and replacement with "equal" treaties became a nationalist cause shared by both Leninist regimes vying for authority in China, the KMT and CCP.[36] The KMT's first National Congress, in January 1924, announced that

[33] Wang 1990b: 236
[34] *Ibid.*: 258
[35] *Ibid.*: 247
[36] The Soviet Union supported and trained both parties during this period. Chen 2008 discusses the KMT guidelines for bilateral renegotiations of the unequal treaties: "(1) the already-expired 'unequal treaties] should be abrogated, and replaced with new treaties; (2) the Nationalist [KMT] government would terminate, through proper means, the 'unequal treaties' that had not yet expired and replace them with new ones' (3) for cases in which the old treaty had expired but a new one was not yet in effect, the Nationalist government would furnish provisional regulations to meet the situation" (Chen 2008: 139). See also *Ibid.*: 135-150 and Wang 2005: 1-6, 113-125.

abolition of all "unequal treaties" was a central premise of Chinese foreign policy, linked to its recognition as an equal entity in international affairs.[37] Protecting Chinese sovereignty – especially its "dismembered" territorial integrity – has remained a core objective for the CCP regime, and the animus behind much of its interpretation and practice of international law in the contemporary era.

The KMT's campaign to abrogate the unequal treaties led to the creation of an International Commission on Extraterritoriality, composed of officials from the United States, Japan, the United Kingdom and nine other European states holding extraterritorial rights in China. The Commission's initial recommendations in 1926 demonstrated awareness of the inequity of the treaties and ultimately recommended the phased dismantling of the unequal treaty regime.[38] Their conditions for doing so effectively made China a "probationary" member of the international community of sovereign equals, linking renegotiation of extraterritorial rights with institutionalization of legal and judicial procedures sufficient to protect the rights of foreign nationals and business interests in China. The Commission concluded that "there could be no relinquishment by the Powers of their extraterritorial rights until the judiciary of China was effectively protected against any unwarranted interference by the executive or other branches of the government, civil or more particularly, military."[39] The Commission also demanded completion and implementation of laws, including a "civil code, commercial code, revised

[37] Chen 2008: 127
[38] "The commission finds that while the system grew out of the necessity of devising some *modus vivendi* whereby harmonious relations might be fostered between China and the several powers, because of the profound difference between Chinese and foreign legal and judicial conceptions, the Chinese have come to feel that the practice of extraterritoriality is a limitation upon the sovereign rights of China. The commission finds that this feeling is due to the growth of nationalistic feeling in China, along with the rapid expansion of foreign interests in the country, bringing more frequently into prominence the anomalies of the present system" (Commission on Extraterritoriality in China 1927: 59-60)
[39] *Ibid.*, 63

criminal code, banking law, bankruptcy law, patent law, land expropriation law, and law concerning notaries public," and demanded that China "should establish and maintain a uniform system for the regular enactment, promulgation, and rescission of laws, so that there may be no uncertainty as to the laws of China."[40] If the Chinese achieved "[r]easonable compliance with all the recommendations" under this "progressive scheme," the parties "might consider the abolition of extraterritoriality" on an *ad hoc* basis.[41]

Mired in instability, Japanese invasion, and Civil War, the KMT was not organizationally capable of implementing the Commission's demands in full, even had they intended to do so.[42] Nonetheless, the unequal treaty regime was gradually dismembered as the young Chinese republic developed rudimentary legal institutions and, probably more significantly, diplomatic competence. The American government was the last power to conclude a treaty renouncing extraterritorial privileges in 1943,[43] in an effort to support a beleaguered wartime ally and delegitimize a system that, since the beginning of Japan's conquests of mainland territory, had mainly accrued to the benefit of the Japanese.[44] Generations of Chinese have learned that the Western renunciation of the unequal treaties was not undertaken in good faith,[45] nor even fully

[40] *Ibid.,* 64
[41] *Ibid.*
[42] "China's inability to accomplish legal institutionalization showed ipso facto that it had failed to fulfill the American and British prerequisites for the abolition of extraterritoriality. This American and British prerequisite under the rubric of a modern legal system was a demand for a legal order characterized by positivist legal understanding and discourses about the scope, application, and underlying values of law" (Kayaoglu 2010: 165).
[43] See "Treaty for the Relinquishment of Extraterritorial Rights in China and the regulation of related matters (11 January 1943)," *United Nations Treaty Series* 1947 (vol. VII, no. 66): 261-284. Belgium, Italy, Denmark, Portugal and Spain concluded treaties by the end of 1928, and the British concluded a phased agreement in September 1931 that completed in 1943. These treaties "transformed the legal-political tenet of extraterritorial jurisdiction from a permanent institution to an ad hoc arrangement, waiting to be phased out" (Chen 2008: 151).
[44] By this stage, Japanese nationals and entities occupying vast swathes of Chinese territory enjoyed a vast majority of the extraterritorial privileges (Chen 2008: 61).
[45] For example, during an author interview with a Ph.D. student in international law from Nanjing University (Haikou, June 2014), he noted that a U.S.-China treaty from 1946 maintained many significant aspects of extraterritoriality ("Treaty of Friendship, Commerce and Navigation between the United States of America and the

completed. The terms of the post-World War II surrender of Japan remain ambiguous and, in the Chinese view, do not properly restore China's sovereignty over various disputed territories – Taiwan and the offshore islands of the East and South China Sea in particular.

Law, Li, and Lenin: A Revolutionary Turn

The successor to the KMT regime, the CCP and their "New China," inherited their predecessors' emphasis on sovereign inviolability, and carried on the purely instrumental conception of international law that reflected at least a century of accumulated hostility to illegitimate, Western international law. The CCP took power in China after a long civil war as a nationalistic, Marxist-Leninist regime committed to clawing back China's international status after the "century of humiliation." Redressing those historical grievances was and remains central to the CCP's claim to legitimate authority over China, an objective inextricably linked to overturning the unequal treaty system and thereby restoring China's territorial integrity and political autonomy. For the CCP, however, imperial and Confucian traditions were rejected outright, rendered as vestiges of an illegitimate "feudal" order, in Marxist terms.[46]

In this rejection, however, Mao Zedong and his revolutionary comrades shared the general nationalist objection to the weakness and corruption of the old regime. Feckless and backward – and now also bourgeois and capitalist – elites had relegated China to inferior status over the past century, in part by failing to adequately represent and defend China's rights and interests as a

Republic of China (November 4, 1946)," *United Nations Treaty Series* 1949 (vol. 25, no. 359): 66-150). See Li 1999 and Xiao 2003 for summaries of how this episode is generally taught and understood.

[46] Whatever the continuity between tradition and modernity in Chinese statecraft, it is abundantly clear that the rejection of tradition by the CCP has had pronounced effects. Jerome Cohen notes the frequent scholarly emphasis on "traces of the tribute tradition in the style of Communist diplomacy…the sense of uniqueness, righteousness and superiority that appears to inhibit friendly relations on the basis of equality. But these are resonances the existence and significance of which are the subject of academic dispute. What is beyond dispute and what is of overriding importance is not the impact of the imperial tradition but the impact of its destruction" (Cohen 1967: 110).

sovereign equal.[47] Regaining that sovereignty demanded, inter alia, revocation of the treaties that gave extraterritoriality to foreign states and denied Chinese autonomy. The Marxist-Leninist leaders of China now regarded these treaties in terms of historical materialism: they partly constituted the superstructure of the international system, which expresses the fundamental economic and social substructure of bourgeois capitalism.[48] It is not necessarily significant whether the illegitimacy of international law derived from its incompatibility with Confucian modes of governance or its offense to Marxist-Leninist scruples. The CCP did not have to revise the hostile, instrumental views about international law they had inherited from imperial and Republican regimes. At least the illegitimacy of the underlying norms was a constant.

Certainly, the rhetoric with which the CCP marketed this opposition to Chinese and global audiences had different ideological packaging from that of prior regimes. Yet the substance, if not the style, of China's grievance with international law was continuous. Even before the PRC "stood up" as an independent sovereign state in October 1949, the Chinese People's Political Consultative Conference (a high-level political advisory body to the CCP) announced a Common Programme for governance in which "[t]he Central People's government of the PRC must study the treaties and agreements concluded by the KMT government with foreign governments and, depending on their contents, recognize, annul, revise or reconclude them."[49] In this respect, they adopted the KMT's position on unequal treaties, differing only in the sense that the CCP wanted to claim all of the credit for righting those historical wrongs.[50] The PRC, however, confronted

[47] "CCP activists and the leftist Nationalists interpreted China's long-standing weakness as a dynamic effect of an alliance between the feudalistic and parasitic Chinese political elites (bureaucrats, militarists, and gentry-turned capitalists), and the encroaching Western imperialism" (Chen 2008: 124).
[48] Chiu and Cohen 1974: 26-64 extensively review Marxist writing on international law by Chinese scholars and officials.
[49] Wang 1990b: 262, citing *Collection of Documents Relating to the Foreign Relations of the PRC*, Col. 1 1949-1950, 29 September 1949 Common Programme, Article 55 (Beijing: 1957), 1.
[50] See Wang 2005: 94-95

political circumstances that dramatically limited its capacity to conduct such diplomatic negotiations – namely, that the defeated KMT regime, now on the island of Taiwan, enjoyed recognition by virtually all non-Communist states as the "legitimate" government of China.

By any standard of legitimacy, the fact of PRC near-total exclusion from the international community defined by public international law made normative opposition to the binding force of international legal norms inevitable. During the twenty-two year period in which the PRC was not represented in the UN, that organization was judged to be "an instrument of American aggression against and intervention in the affairs of other states,"[51] and could be easily dismissed as an illegitimate source of international norms. The ideological repertoire provided by Marxism-Leninism, adapted to China's position vis-à-vis the international legal system, bolstered this view. It furnished ready rhetoric for contesting "the formulation, the registration of power relations"[52] represented by Western international law.[53] Law's legitimacy was not only denied, but actively contested as the "legitimizing instrument [of] the exploiting class or nation."[54]

The move from treating international law as "an instrument of Western domination" over a weak imperial China to "an expression of the will of the ruling class"[55] consisting of those same Western states is convenient. Both demonstrate hostility and cynicism about the purpose and function of international law; both denigrate the process by which it is formed and implemented. Lenin's view of law sits neatly with traditional Chinese conceptions – especially in regarding law

[51] Chiu and Cohen 1974: 45. This was more than an ideological position: the intervention on the Korean peninsula in 1950 was a UN action, and led Chinese "volunteer" troops into combat with nominally UN forces.
[52] Lenin 1932, cited in Carr 1946: 176
[53] "From its birth date, Mao's China challenged the Western powers in general and the United States in particular by questioning and, consequently, negating the legitimacy of the 'norms of international relations,' which, as Mao and his comrades viewed them, were of Western origins and inimical to revolutionary China" (Chen 2001: 4).
[54] Kim 1978: 325
[55] Lenin 1932, cited in Carr 1946: 184

as one element of a hierarchical relationship, used not for the liberal purposes of granting rights to actors at lower levels, but rather as a coercive instrument for superior individuals, states, or classes to impose their will from the top down.[56]

Whatever the theoretical reasoning, the practical imperatives motivating Chinese Communists were largely consistent with those that motivated prior Chinese governments: limiting the degree to which international legal agreements infringed upon China's sovereignty and autonomy. "International law," explained the CCP mouthpiece newspaper, the *Renmin Ribao*, "is one of the instruments for settling international problems. If this instrument is useful to our country, to the socialist cause, or to the cause of peace of the people of the world, we will use it. However, if this instrument is disadvantageous to our country, to the socialist cause, or to the cause of peace of the people of the world, we will not use it and should create a new instrument to replace it."[57] There is no ambiguity whatsoever in this instrumental conception, and emphatically no belief in the legitimacy of obligations associated with the law.

This attitude dictated the way international law was taught to future generations of Chinese elite. The most influential Chinese international law scholar of the twentieth century, Wang Tieya, taught at Peking University and instructed current and future Chinese diplomats, lawyers, and officials that the basis for any binding, legal effect for international law "can only be attributed to states themselves, that is, the will of states."[58] He and others propounded the standard view that

[56] Virtually all of China's first generation of international law scholars were trained in the Soviet Union, and imported the illiberal Leninist conception of law from Soviet authorities, especially A.Y. Vyshinsky, who helped reconcile the problem of using law despite its bad class origins. His theory saw Communist parties as representing the will of the proletariat, capable of revoking illegitimate laws and creating new positive law in its stead that reflects the "dictatorship of the proletariat" (Howson 2009: 824). He cites an influential Soviet legal theorist, Marchenko, who argues that "[c]itizens obtain freedom, justice, and security from the state's exercise of control and power, rather than the state and its leaders deriving authority from its citizens."
[57] Chu 1957, cited in Chiu and Cohen 1974: 32
[58] Wang and Wei 1981: 206

all law prior to the effective representation of that sovereign will – that is, unequal treaties and any other law generated under illegitimate circumstances – was null.[59] That will was starkly differentiated from the positive law view that consent is the basis of legitimate public international law. Another prominent early PRC international law scholar sounded a typical grievance that the "[s]o-called 'consent' [from small countries] is reached under circumstances of compulsion…various big imperialist powers used the threat of force to compel various weak and small countries to 'consent' to the conclusion of a large number of unequal treaties."[60] The Chinese interpretation reads quite like the view of international law from power. PRC leaders and intellectuals prescribed more power as the only viable counterweight.

Although radical shifts in China's international orientation and domestic ideology were afoot throughout the period from the founding of the PRC through the beginning of the reform period in 1978, the orthodox view of international law (as basically illegitimate, useful only insofar as it is an instrument) was not in question. The political climate curtailed the range of permissible opinions in academic and public life, and led to withering criticism for "Rightists" who placed too much stock in the normative underpinnings of international law. Even eminent scholars like Wang Tieya were subject to purges for teaching international law as a technical field with some legitimate basis, rather than as an instrument of power. Public criticisms of divergent views were

[59] Legal scholars in the PRC found international law prior to the present to reflect "not only the will of the ruling class of a state, but also the will of the ruling classes of the respective states participating in the agreement" (Cohen and Chiu 1974: 33, citing Wu-Shang and Chun 1957, A Criticism of the Reactionary Viewpoint of Ch'en T'i-ch'ing on the Science of International Law. Another leading international law scholar and teacher, Zhou Gengsheng, explains in his widely-used textbook that "international law is formulated in the process of international transactions and recognized generally by various countries. It expresses the will of the ruling class of these countries and is the aggregate of norms and behaviors with legally binding force on countries in their international relations, including principles, rules and institutions" (Zhou 1981: 3). See also standard views on prior treaties as intrinsically coercive in Cohen and Chiu 1974: 70-71, citing Ying t'ai 1960, "Recognize the True Face of Bourgeois International Law from a Few Basic Concepts."

[60] Ying 1960, cited in Cohen and Chiu 1974: 36-37.

damaging, even before the chaotic purges of the Cultural Revolution. The "Anti-Rightist Movement" of 1957 persecuted legal theorists gullible enough to assign any degree of legitimacy to international law independent of its instrumental use, and effectively ended the legal profession in China until after the Cultural Revolution.[61] "[T]his comrade," wrote one prominent critic of the denounced "Old-Law Viewpoint of Teaching of International Law" espoused by Chen Ti'Chiang, "failed to recognize that international law is a legal instrument in the service of our foreign policy."[62] This emphatically instrumental view, rooted in historical experience, survived not only imperial decline but also the dizzying political instability of the Mao era.

Toward a Legitimate Basis for International Legislation

Without allegiance to a system from which they were excluded, the PRC experimented with a variety of different ways to put international law into its service as an instrument of statecraft. The clearest and most enduring Chinese articulation of an alternative normative framework by which to interpret international law is found in the Five Principles of Peaceful Coexistence: "mutual respect for each other's sovereignty and territorial integrity, mutual non-aggression, non-interference in each other's internal affairs, equality and mutual benefit, and peaceful co-existence."[63] Developed over the course of treaty negotiations with India and Burma during the early 1950s, this indeterminate and sovereignty-focused approach to international relations appealed to the large number of post-colonial states who shared China's lack of enthusiasm for the existing stock of international rules.[64]

[61] Kim 1987: 119
[62] Sung et al 1958, cited in Cohen and Chiu 1974: 31
[63] These principles have endured in Chinese diplomacy for sixty years, well-reflected in the remarks of the present Chinese president at a conference commemorating their enduring normative weight (Xi 2014).
[64] The Five Principles garnered widespread global appeal at the Asian-African Conference at Bandung, Indonesia in April 1955, where twenty-nine post-colonial states endorsed a modified version of the Chinese proposal.

It bears remark as an indication of the basic principles that the PRC uses to interpret international law, which differ substantially from those of the liberal west – not least in prescribing direct application of international law as an instrument of foreign policy. The formulation of these norms, grounded especially in the Chinese and Indian experience, represents a diplomatic response to a system that "include[d] many obligations which obviously encroach upon the sovereignty of other states, invade other states domestic jurisdiction, and are detrimental to other states' interests."[65] The Five Principles are readily recognizable as core components of China's attitude toward international law long after its accession to the UN.[66] They are nothing if not indeterminate, granting wide interpretive scope for China to place illiberal emphasis on the inviolability of state sovereignty[67] that endured throughout the law of the sea negotiations and beyond.

II. Preferred Norms to Mitigate Maritime Vulnerability

The PRC's official account of China's "century of humiliation" gives prominent play to maritime threats. According to the frequently-cited (but unsourced) official count, some 470 invasions of China came from the sea.[68] These seaborne conquests led to the formal imposition

[65] Ying 1960, cited in Cohen and Chiu 1974: 37

[66] Leading international law generalists described China's contemporary attitude as follows: "China's vision of international law rests on the principle of sovereignty. Under the Chinese view, sovereign states have an inalienable right to exercise jurisdiction over their territories and their people without interference from other states. The internal affairs of a state are left for the state's own people to govern; international affairs are decided by consultation among states acting on the basis of equality and mutual benefit" (Bradford and Posner 2011: 25).

[67] In the words of an influential PRC study of international law, "[w]e all know the the principle of inviolability of territory is one of the fundamental principles of generally accepted modern international law and that it is also prescribed in a series of international law documents. According to the viewpoint of modern IL, state territory is the material expression of state independence and state sovereignty. An encroachment of the territorial integrity of a state is an infringement of its sovereignty and is [therefore] an aggressive act in violation of international law" (Shih 1958, cited in Chiu and Cohen 1974: 355)

[68] This figure is repeated in over three-dozen articles and books consulted by the author, and was frequently cited in interviews, workshops and conferences with Chinese experts during fieldwork in 2014-2015. One interviewee explained that this is the number taught in elementary and junior-high classes, and which is always on history exams (author interview with law professor, Renmin University, Beijing, December 2014). See, for example, Peng 2010:

of foreign demands represented in the unequal treaty regime, limiting China's sovereign authority over its own territory. China's earliest experiences with international law indicated that it was also potentially useful as an instrument that could mitigate this vulnerability. The desired instrumental function is, effectively, *closure* – that is, the law should limit the rights of users of maritime space under Chinese jurisdiction. The Chinese preference for the norm of closure – and the tendency to interpret the law of the sea as promoting it – arises at least in part from historical experiences with maritime law and maritime security. By the twentieth century, Chinese statesmen had learned to conceive of the law of the sea as a potentially useful instrument to mitigate China's maritime vulnerability. This facet of China's identity, what we might call a "maritime victim complex," powerfully shapes the way China's political and military elite interpret their interests in the law of the sea.

Historical Development of a Maritime Victim Complex

The Treaty of Nanjing was signed August 29, 1842 aboard a British Royal Navy frigate, *HMS Cornwallis*, anchored in the Yangtze river over 200 miles inland from China's eastern coast. British vessels had devastated the Qing's fleet and penetrated China's major riverine systems, exploiting weak coastal defenses to deliver highly unfavorable terms in this first of China's unequal treaties. They secured permanent access to – and even territory in – major coastal ports

"In Chinese modern history, most invasions from powers exterior to China came from the sea. During China's history prior to 1949, China suffered 470 invasions from the sea, including seventy large-scale invasions, such as those during the Opium Wars. From Dagushan on Liaodong Peninsula to the port of Sanya on Hainan Island, nearly all of China's major harbors, ports, and islands suffered external invasions. Taiwan, Penghu, Hong Kong, Jiulong, Macao, Lüshun, Dalian, Weihaiwei, Jiaozhou Bay, and Guangzhou Bay were all forcibly ceded or "rented," becoming springboards and bridgeheads for exterior powers to attack China's inland regions. At the same time, the invaders grabbed coastal trading and navigation rights from China. Therefore, an important conclusion to be drawn from both history and reality is that China's coastal area is the linchpin of its national security" (Peng 2010: 15-16); NB – Ji 2009 cites 479 invasions, 84 of which were large scale, 1860 attacks on Chinese ships and casualties to 470,000 Chinese people in order to coerce the Qing into more than 50 unequal treaties (Ji 2009: 14).

like Shanghai and Canton, and paved the way for European and American navies and commercial interests to extract similar concessions in later treaties. Chinese students in the PRC have learned that "[t]he unequal treaty regime thus formed was essentially based on force. Force was symbolized by gunboats and naval vessels on the rivers, in the ports and along the coasts."[69] While this critical view is alive and well in Western legal scholarship, it is not just the mainstream but the only stream of public discussion in China: foreign coercion is the well-spring of international law, and none of its high-minded, liberal principles are spared this stigma.

Chinese elites came to recognize the instrumental role of international law in the Western powers' consolidation of their strategic gains. By concluding binding "contracts" in unequal treaties, these foreign nations secured favorable and enforceable terms for their continued commerce in China. Chinese actions in breach of their duties to honor contracted foreign rights warranted military reprisals – usually undertaken with naval force, and tending to further extend extraterritorial privileges. Chinese historiography is unanimous in the view that "[t]he reality of history is that trade followed gunboats, not contracts."[70] Treaties concluded under duress induced by superior Western naval firepower led the Qing to gradually recognize that "international law could be useful as a device for defending China's interests."[71]

The Second Opium War (1858-1860) initiated another round of unequal treaties with the British, French, Americans and Russians. This latest humiliation inspired the Qing court to study international law in earnest – the law of the sea in particular – commissioning translations of

[69] Wang 1990b: 252; see also Wei 1957, who notes that "vessels belonging to imperialist countries not only plied between our coastal ports to engage in trade, but even sailed freely to Chungking – a port 1350 nautical miles from the seashore – and did business all along the way. Moreover, warships also cruised up and down at will, invading and encroaching upon our rights under the excuse of protecting their merchant vessels" (cited in Chiu and Cohen 1974: 467-468).
[70] Zhang 2012: 10
[71] Chiu and Cohen 1974: 8

influential European treatises and invoking Western international legal norms in asserting China's own rights.[72] Foreign missionaries helped promote major works by Vattel, Wheaton, and Grotius, the latter the key publicist of the "freedom of the seas" doctrine that had facilitated liberal, commercial competition for access to Chinese ports and markets. Where law had long been regarded as a trivial foreign curiosity and a cultural mismatch with the Qing court's preferred modes of intercourse with foreign tributaries, Chinese weakness made knowledge of these new diplomatic norms necessary, even if they were still held in contempt.

The first commonly-cited example of such instrumental use of international law occurred in 1864, after a Prussian warship seized Danish vessels in the harbor at Tianjin. Loosely invoking the concept of China's "territorial sea" (the actual terminology used was "inner ocean" [内洋]), Qing diplomats denied Prussia's legal competence and secured the release of the vessels and compensation to China for the violation of their rights.[73] In registering their complaint with the Prussian envoy in terms explicitly linked to those same treaties that denied China equal rights, the Qing ministers stated that "[t]he various oceans under China's jurisdiction have, as a rule, been specifically stipulated in all her peace treaties with the foreign nations, and in the peace treaty with your nation [Prussia], there is such a term as 'Chinese ocean.' You know this more clearly than any other country and how can you say it is beyond your comprehension?"[74] In their memorial to the court, the ministers noted the somewhat surprising utility of international law in advancing China's claim: "For instance, in connection with Prussia's detention of Danish ships in Tianjin harbor this year, your ministers covertly used some statements from that law book

[72] Chiu and Cohen 1974: 9-10
[73] Wang 1990b: 232-234 recounts this story in detail, citing official records "The Memorial of the Tsungli Yamen to the Court," (30 August 1864), *Beginning and End of the Management of Barbarian Affairs*, *Tongzhi Period*, Vol. XXCII, p 30; see also Wang 1985: 84-90; Gao 2009: 267; and Hsü 1960: 133.
[74] Wang 1990b: 233

[Wheaton's *Elements of International Law*] in arguing with [the Prussian minister]. Thereby, the Prussian minister acknowledged his mistake and bowed his head without further contention. This seems to be proof of its usefulness."[75] This high official's statement speaks directly to the pure instrumentality of China's international legal practice, and basic disinterest in the basis of law's normativity to the curiously obedient Europeans.

The lesson of that first, moderately successful invocation of the law of the sea in dealings with foreign powers paved the way for later efforts to establish various Chinese maritime rights under international law. Clauses recognizing some kind of Chinese territorial sea remained vague, however, and tended to lack any specificity about the scope of Chinese authority in its coastal waters.[76] Qing China's legal institutions were not adapted to Western international law and did not have any language or precedent for dealing with foreign rights. Thus, the jurisdictional distinction between China's "inner" and "outer" oceans "did not develop into a sophisticated regime similar to that of the territorial sea in Western international law."[77] It was not until 1899 that any fixed limit was set, in the Sino-Mexican Treaty of Friendship, Commerce, and Navigation, wherein the parties acknowledged territorial waters extending to 9nm.[78] Less formally, an incident in 1908 in which a Japanese vessel was seized operating at 2nm from China's coast led to negotiations under the presumption that China's jurisdiction extended to at least 3nm as a matter of custom.[79] Such formal claims were new in Chinese diplomatic practice and did not constitute a major part of their repertoire. They are nonetheless notable as first efforts

[75] *Ibid.*, 234
[76] See, for example the 1844 US-China Treaty of Peace, Amity and Commerce and the 1856 Great Britain-China Treaty of Peace, Friendship and Commerce, where some Chinese waters were acknowledged but not defined or delimited.
[77] Chiu 1975: 34
[78] Wang and Wei 1981: 936
[79] Chiu 1975: 36

to effect closure by asserting a rudimentary legal basis for China's jurisdiction over maritime space.

In the midst of a disintegration facilitated by vulnerability to Western maritime power, the Qing court did not formalize its own maritime laws nor uniformly enforce its rights under the customary law of the sea. The ROC, however, was far more familiar with Western methods and intent on employing legal means to dismantle the unequal treaty regime and restore China's full sovereign territoriality. In Year 1 of the ROC (1912), the Ministry of Foreign Affairs began to consider the question of the width of China's territorial sea. An internal memorandum recommends that "we should extend our territorial sea [to 10nm] to protect our maritime rights."[80] That recommendation languished until a 1931 proposal to the Executive Yuan which argued that because a weak state's "national power is not sufficient to protect its rights within the territorial sea, it can only think of relying on public international law to deter a strong power's encroachment on its fishery, to maintain its neutral rights in time of war and to facilitate its measures of sea defense."[81] Eventually, the ROC enacted an "Order Prescribing the Scope of the Territorial Sea as Three Nautical Miles," including a 12nm zone in which it claimed jurisdiction to investigate and interdict smuggling.[82] This was the first in a succession of formal, legal pronouncements by Chinese governments to specify the scope of their maritime jurisdiction.

Holding Chinese representation in the UN until 1971, the ROC participated in the negotiations over the law of the sea beginning in the UN International Law Commission (ILC) and continuing into the First Conference on the Law of the Sea, at Geneva in 1958. Their delegation deferred to

[80] Chiu 1975: 37, citing Sino-Japanese Fisheries Negotiations [中日渔业交涉], June 2 - Nov 19, 1912, Academia Sinica Diplomatic Archives, Taipei, ROC.
[81] Diplomatic records cited in Chiu 1975: 38
[82] Chiu 1975: 38

the "maritime powers" in *not* claiming that states should enjoy unilateral rights to determine the extent of their territorial sea, recognizing that Taiwan was now a treaty ally of the United States and dependent upon their good will and "essential services."[83]

The government of the PRC, by contrast, had no such allies. Excluded from this first round of "international legislation" on the law of the sea, Chinese officials rejected the legitimacy of UNCLOS I. Mainland diplomats and scholars, however, took note of the law of the sea developments[84] at the UN and began to ask: "How wide should the breadth of our territorial sea be? This question should be decided by jointly considering the concrete situation of our sea coast, national defense and security, and the welfare of the people. He author cannot give a definite figure, but under no circumstances should it be less than 12nm."[85] These indeterminate principles of "national defense and security" and "welfare" supported norms of closure, later advanced by PRC delegates at the Third UN Conference on the Law of the Sea.[86] Taiwan was now not only "redeemed" from the injustices of the unequal treaties and firmly in the camp of the United States, it was geographically delinked from the mainland. The PRC interpretation of its maritime interests, however, reflected both of those conditions. Its leadership began to press for an interpretation of the law of the sea that promoted closure.

Continental strategic mindset and norms of closure

[83] U.N. Doc. A/Conf.13/39. Chiu argues that this position was also based on its desire to join the U.S. in opposing Soviet proposals for more extensive coastal state rights (Chiu 1975: 42).
[84] For example, the draft articles of the law of the sea developed in the ILC as early as 1956 were translated into Chinese and circulated within the Ministry of Foreign Affairs (Chiu 1975: 45).
[85] Wei 1957: 25
[86] See Chapter 2, Part III

The PRC in the 1950s assumed the historical legacy of previous mainland regimes with respect to maritime threats. The new state remained transfixed by rectifying the injustice of unequal treaties, and, with its inheritance of the mainland of China, was saddled with maritime vulnerability rooted in geography. Again facing a hostile international environment dominated by materially-stronger Western powers, the leaders of the PRC interpreted the law of the sea in terms that promoted norms of closure that might deny some degree of access to its coastal approaches by the superior naval forces of the United States and its allies, forward-deployed in East Asia since World War II. This "continental mindset" – a desire to simply limit vulnerability, rather than project power, in the maritime domain – is a distinctive feature of China's identity. It leads Chinese strategists to perceive a special interest in closure, as a function both of timeless geography and harsh historical experience. The maritime domain presents a peripheral challenge to a Chinese strategic tradition predicated on threats to its security from the Eurasian continent.

China is surrounded on three of four sides by terrestrial neighbors, and historically focused on the "barbarian" threats from the north and west of its coastal and riverine heartland. Invasions from this steppe frontier ushered in the non-Chinese Mongol Yuan dynasty (1271-1368) and Manchu Qing dynasty (1644-1911), inscribing profound lessons in the Chinese strategic outlook regarding the unwisdom of neglecting a continental orientation. Maritime threats, in the conventional geostrategic reading, are a second-order problem for a state firmly lodged in the Eurasian continent; if they are prioritized above threats emanating from land-based adversaries, the result is misallocation of resources and strategic attention, and eventual defeat.[87] With the

[87] Ross 2009: 47-54 surveys strategic writing on "optimal strategies" for land and sea powers. He argues that historically, a continental power is generally "unable to resolve its land border insecurity, [and thus] cannot approach military parity with the maritime power" (Ross 2009: 53). He argues that "nations are land or sea powers not because of cultural or historical predisposition, but because of enduring geopolitical circumstances that tend to reward particular defense strategies" (*Ibid.,* 47).

exception of the Ming fleet in the late fifteenth century, commanded by the legendary eunuch Zheng He, successive Chinese dynasties focused their strategic attention and resources on the continent. Maritime defenses were rudimentary, with minimal resources allocated to passive defense-in-depth.[88] This is summarized in the phrase "heavy on land, light at sea" [重陆轻海], often used in Chinese discussions of its traditional, continental strategic outlook.[89]

China in the contemporary era shares land boundaries with fourteen states. Several are major powers with whom the PRC has engaged in limited military conflicts over its short existence (India in 1962, Russia in 1969, and Vietnam in 1979). The People's Liberation Army (PLA), and prior to 1949, the Red Army of the CCP, is named appropriately: it is an *army* first and foremost. The organization was forged in the crucible of intense land conflicts. With inferior technology and organization, it relied on irregular, guerilla warfare ("people's war" in Mao's writings) that drew enemy forces away from their logistical and firepower advantages along the coasts and into the interior.[90] The ranks of the leadership, its force structure, and the budgetary and political balance of the military organization as a whole have long been dominated by the land forces.[91] This organizational identity is a function of historical experiences that shaped how military leaders understand the imperatives dictated by China's continental geography.

[88] According to Chinese military experts, "[o]ver a long history, China has not only made constant and intensive use of the sea, but has also tended to regard the sea as a natural feature that operates to deter foreign invaders. In 1523, in order to suppress Japanese pirates, the adjacent sea along the Chinese coasts was declared closed" (Yu 1995: 228).
[89] Chinese military experts describe the meaning of this phrase as "attach importance to the land and treat the sea as unimportant" (Hao and Yang 2005: 204). It is a widely-recognized formulation, appearing also in Chinese works on the law of the sea: "Historically, China did not attribute as much attention as it should to the sea or sea power, which was thought to be irrelevant to the maintenance of a great land empire [重陆轻海]. This is sometimes referred to in the Chinese literature as having seas but no defense. As a result, China suffered foreign invasions…" (Gao 2009: 267).
[90] Mao 1965: 113-194
[91] The military reforms launched in early 2016 may have significantly altered the ground force-heavy orientation of the PLA (Saunders and Wuthnow 2016).

A firmly continental identity informs closed Chinese interpretations of the law of the sea (Cole 2010). China's maritime strategic outlook is principally defensive, given its geographic configuration as well as entrenched beliefs about how to allocate resources to properly defend its population centers. Chinese military leaders prefer to establish interior lines from a fortified coast, thus denying access and securing the continent – rather than using the seas as a platform for strategic mobility and offensive maneuver. Subsequent developments in Chinese strategic thinking about how to utilize the law of the sea as a "defensive weapon" reflect these preferences.[92] For armed forces and strategists without strong capabilities for projecting maritime power and lacking well-developed doctrine for "blue water" operations, using international legal norms to effectively push out China's territorial boundaries is a cheap and appealing option. This legal instrument is meant as a complement to military modernization and reorganization towards engaging in "military struggle in the maritime direction," a strategic goal laid out by the current administration.[93]

Still, simply maintaining a closed interpretation and protesting foreign access is hardly a sound basis for expecting to meaningfully limit maritime vulnerability. Credible enforcement of preferred norms of closure would require significantly greater defensive capabilities, which demands modernization of China's navy and coastal defenses. Allocating resources to these purposes was only possible with attendant shifts in doctrine to emphasize what current Chinese strategists have come to call China's "dual land-sea power" [海陆兼备国家].[94] This slow

[92] Bickford 2011

[93] This quote is from Xi Jinping, who urged the PRC to "coordinate military struggle with political, economic and diplomatic struggles to forcefully defend core interests" (PRC Ministry of National Defense 2015, "III. Strategic Guideline of Active Defense").

[94] Other formulations for this hybrid status are "composite land-sea nation" [陆海符合国家] and "continental-coastal nation" [大陆滨海国家]. For full discussion of these doctrinal developments, see Hartnett and Velucci 2007; Bickford 2011; Shao and Shi 2000; Feng and Duan 2007; Fang 2004; and Zhang 2012.

reorientation to address maritime threats began under Mao, who argued in the 1960s that "in the past, we had the sea but did not have defense on the sea, so we were bullied by foreigners."[95] It did not come to fruition until after his death, however, when China's "reform and opening up" period made international law's value as an instrument value far more significant and ideologically reconcilable with China's interests in integrating with the world economy.

III. Fashioning An Instrument From the Law of the Sea

The historical and cultural-institutional basis for China's views about the illegitimacy of international law, and its specific experiences of weakness in an open law of the sea regime, contribute to a PRC interpretation of UNCLOS III that is otherwise unaccountable. The trauma of unequal treaties and the hard lessons of maritime vulnerability do not in themselves produce the observed outcome, but they furnish a rich normative context for understanding how and why the PRC came to the interpretive stance that it did at the Conference and beyond.

The PRC's closed interpretation of the law of the sea emerged during the period of the new treaty's negotiation through its ratification, spanning the late 1960s through the late 1990s. In the midst of radical changes in China's domestic and external political orientation, certain cultural-institutional factors and historical context remained constant. These manifested in a consistent attitude toward international law as fundamentally illegitimate but potentially useful. International law was an instrument which Western powers used to "dismember" Chinese territorial integrity and degrade its sovereignty, but could in principle be used for other purposes. The process of operating within this international legal system eventually led to some learning about how international law could also be used to defend against such incursions. China's

[95] Tang and Xie 2011: 17

maritime vulnerability in a period of military weakness made law appear to be a suitable means for transforming, or at least challenging, the liberal norms promoted by the West.

This orientation was on display from the first formal PRC legislative act on the law of the sea, a declaration of a 12nm territorial sea in direct response to the threat posed by the American navy during the "Second Taiwan Strait Crisis" in late summer 1958. During this limited engagement with the ROC, Beijing faced the problem of American vessels and aircraft escorting and supplying Taiwanese vessels up to the 3nm mark from the mainland coast. PRC forces avoided operating beyond 12nm and shelled ROC vessels operating in this range, but not beyond,[96] later codifying this practice in the PRC's 1958 Declaration on the Territorial Sea.[97] Responding directly to the incursions of American surface vessels, the PRC advanced an international legal claim as an instrument to limit its vulnerability. In claiming a 12nm zone surrounding its coastlines – as well those of Taiwan and the disputed islands of the South and East China Seas – the PRC announced that "while navigating Chinese territorial seas, every foreign vessel must observe the relevant laws and regulations laid down by the Government of the People's Republic of China."[98] In this first legislative act, we see the rudiments of a later preference for indeterminacy in its pronouncement that unspecified domestic law would be authoritative in this domain. We also observe a direct challenge to the liberal norm under which American vessels could operate with impunity up to the Chinese coast. The declaration served an illiberal goal of making those navigational rights dependent upon the discretion of the state.

[96] See Whiting 2001: 109-111 for description of this campaign.
[97] Reproduced and analyzed in US Department of State 1972: 2.
[98] PRC Ministry of Foreign Affairs 1958: "Declaration on the Territorial Sea of the PRC, Art. 3"

The PRC's exclusion from the UN prior to 1971, however, eliminated Beijing's capacity to participate directly in "international legislation" to that end. The domestic events of the Cultural Revolution, meanwhile, limited Chinese officials' practical knowledge of how to fashion a useful instrument out of legal norms and rules. The following section summarizes the political context in which the PRC dispatched its diplomats to negotiate the Convention, then describes recalibration of Chinese attitudes toward law leading to China's eventual ratification of UNCLOS III in 1996. By focusing especially on how it was taught to future practitioners in the PRC over this period, we can observe basic continuity in the Chinese attitude toward international law – but now in a context of a growing appreciation for the range of practical functions it might play. Chinese identity vis-à-vis international law is more continuous than its violently discontinuous political history over this period. As victims of Western aggression for which international law was a potent tool, at no point was this law regarded as having any independent legitimacy – only instrumental efficacy when wielded with sufficient power and appropriate purpose.

From Revolutionary Neglect to Reformist Respect

Among the many radical and destructive aspects of the Cultural Revolution (1966-1976) was the total disestablishment of China's system of higher education. International law, with its Western origins and its "bad class background" as a tool of bourgeois capitalism, was among the most reviled disciplines. Ideological attacks on law "led to the spread of legal nihilism of despising the law, negating the legal system and ignoring legal education."[99] Law schools were shuttered and used as psychiatric hospitals, storage for vegetables, and military barracks.[100] Law professors and

[99] Han and Kanter 1984: 550
[100] Wang 1983: 77; Minzner 2013: 343

practitioners were "sent down to the countryside for reeducation" in menial agricultural tasks. Diplomats were recalled en masse from their postings abroad.

By the time the PRC took its seat in the UN in 1971, its lead representative, Huang Hua, did not have any politically viable legal experts to place on the UN's Sixth Committee, "the primary forum for the consideration of legal questions in the General Assembly."[101] For that role, he appointed his wife, He Liliang, who was trained as an economist.[102] The PRC UN delegation's lack of experience in international law compounded the long-standing lack of respect for its legitimacy. However, PRC "socialization" in this institutional setting likely catalyzed growing appreciation of the potential utility of international law for a permanent member of the UNSC.

Among the first major issues confronted by the PRC was the law of the sea, then becoming a major Third World cause in the General Assembly.[103] The diplomat Ling Qing declined an initial appointment to lead the Chinese negotiation efforts because he "had never before researched the law of the sea." Eventually he agreed to serve because "by then China had participated in the Seabed Committee for two years….and had already openly explained our positions in meetings and other fora. [He] just needed to do follow up work."[104] Adjustment of Chinese positions in light of new understandings reached by a group of non-specialists appeared impossible during the process of negotiations, as PRC delegates represented a set of political goals that were determined independent of the content of the treaty itself.

[101] United Nations General Assembly, Sixth Committee http://www.un.org/en/ga/sixth/
[102] Huang Hua related this to Jerry Cohen in 1974, who shared with the author in February 2012.
[103] See Ch. 2, Part I for discussion of its origins in Latin American and African proposals.
[104] Ling 2008: 6

The diplomats tasked with representing China's law of the sea interests were not trained in that highly specialized field, obscure even to international lawyers without specific training. Even if, over the course of the long negotiations, they came to new understandings of the law of the sea's function and purpose, the individuals themselves faced dire political consequences for espousing any belief in the normativity of international law. Some manifestly came to recognize that the substantive positions adopted by the PRC were not in its material interest, but had no reason to alter their diplomatic tack in an "international legislation" process that was conceived in entirely political terms. Ling Qing, the diplomat who had resisted taking the lead in negotiations, discussed the 200nm EEZ with experts from other states and came to the conclusion that it was indeed disadvantageous to China. Still, he recognized that "he had no choice to accept it if [we] wanted to ensure solidarity in the group of developing nations. Afterward I revisited this issue in a discussion with the Chinese delegation…[some of whom] believed I was wavering in my politics and not resolute in supporting the 200nm rule."[105] The PRC's substantive positions appear secondary to the political role they set out to play as a champion of the Third World, demanding a revision of an illegitimate old liberal order to secure rights for weak developing states who could not secure them otherwise.

With the death of Mao and the initiation of major "reform and opening" under newly-appointed CCP Chairman Deng Xiaoping that began with the Third Plenum of the Eleventh Central Committee in December 1978, a focus on development – "socialist modernization" – came to supplant the ideological hostility to international legal institutions. Over the course of negotiations and China's long deliberation (1982-1996) over whether to ratify the law of the sea, international law was greatly rehabilitated in China's educational system and government as a

[105] Ling 2008: 7

suitable means to achieve a range of essentially economic ends. China's ability to participate directly in the "international legislative" process allowed Chinese preferences about norms and principles of international law to influence the law's "progressive development and codification." So too did its growing economic and military power. International law became more practicable due to the combination of increasing knowledge among Chinese scholars and officials, new imperatives of reform, and growing capacity to use it as an instrument.

International Law as an Instrument of Closure

Beginning in 1979, prominent Chinese experts began to call for a renaissance in the PRC approach to legal questions. Chinese academic institutions began to heed Deng's dictum that "we must attach importance to and strengthen the research work of international law."[106] Deng's call was followed by a major proliferation of academic work on the subject of practical participation in international law. Remarkably, the only international law scholarship that had been published in the PRC during the period 1965-1979 was Wang Tieya's *Collection of Materials on the Law of the Sea*, which was published for internal circulation in 1974.[107] In 1979, Wang Tieya and Wei Min published an article in the Party mouthpiece, *People's Daily*, entitled "We Must Strengthen International Law Research,"[108] opening the floodgates for general and specific work on the subject. An unpublished textbook written in the 1950s and 1960s by one of leading Chinese international legal jurists of that era, Zhou Gengsheng, was finally released to the public in 1981,[109] and followed by an influential text that immediately became the core of Chinese international law curricula, authored by twenty Chinese international law scholars, and edited by

[106] Deng 1983: 136-137
[107] Chiu 1987: 1159
[108] Cited in Chiu 1987: 1134-5
[109] Author interview with law professor at Peking University (September 2014).

the eminent Wang Tieya.[110] This latter text in particular sought to instruct Chinese students in international law's practical, policy-related utility rather than its theoretical basis – that is, its instrumental, not normative, components.[111]

In short, international law was restored to academic curricula and diplomatic statecraft as a means to facilitate China's "socialist modernization." The rehabilitation of international law reflected an authoritative decision to participate in international trade and investment and seek access to global resources and technologies.[112] In order to train personnel to this end, Chinese scholars throughout the 1980s began a comprehensive reconfiguration of the old ideological aversion to international law. No normative belief in the appropriateness or legitimacy of the system was necessary for the practical purposes for which legal instruments like the law of the sea were to serve. Marxist-Leninist objections to the basic enterprise of international law were largely muted or even reversed. The influential Wang textbook led the way, pronouncing that "[i]n international society there is no ruling class, nor is it possible to have such a class."[113] This reconfiguration allowed later scholars to embrace the long-appreciated instrumental value of international law: "[i]n our country, we need to use the instrument of international law to serve the realization of the task of socialist modernization."[114]

The law of the sea was the first major multilateral treaty in which the PRC played a role. UNCLOS thus garnered a high degree of scholarly and official attention in light of this

[110] Wang and Wei 1981; see Kim 1987: 121-122 for fuller discussion of these developments.
[111] Kim 1987: 123, fn 23
[112] A leading Taiwanese scholar of Chinese practice of international law surveyed the international law writing in China during the early reform period, and noted that it became commonplace to argue that the "external legal relations necessary for attracting foreign investments, introducing foreign technology to China, forming joint ventures, conducting joint exploration for natural resources and participating in other Sino-foreign economic cooperation must be regulated and adjusted through legal formalities" (Chiu 1987: 1128).
[113] Wang and Wei 1981: 9
[114] Liu et al. 1984: 525

reconsideration of international law as a viable instrument of statecraft. Major textbooks advocated disciplined study of the law of the sea in order to support China's modernization goals, and made emphatic note of the fundamental mutability of major international legal norms. Goal-oriented participation in the international legislative process and concerted state practice could change the functions and purposes of international law in desired ways.[115] The Wang textbook called special attention to the fact that the regimes of the continental shelf and EEZ took less than twenty years to develop in the postwar period. These regimes were susceptible to change because states "legislated" new norms.[116] This attitude was well-represented by the newly established China Society of International Law, which held each of its first two meetings (in 1980 and 1981) on the subject of the law of the sea.[117] The inaugural meeting's keynote address emphasized that "the general trend of international law is development and change. In what direction will it develop and how will it change? At present the most vital issue is to fight for legislative power of international law."[118] This was not so much a reassessment of the nature of international law, per se, but rather an upgraded appraisal of China's capacity to "exert the influence [of its] foreign policy during international legislative proceedings."[119]

The consensus view was and remains that a disadvantageous maritime legal regime could be reformed to suit Beijing's interests; not simply material capabilities but knowledge of the

[115] This is a common position advanced throughout all major Chinese textbooks surveyed by this author, as well as a repeated claim made by Chinese legal scholars during fieldwork interviews and discussions (Haikou, Beijing, and Taipei 2014-2015). Further, at all conferences and workshops on international law and the law of the sea attended by the author (2012-2015), discussions of international legal rules were explicitly or implicitly premised on the notion that China intended to exert influence on their interpretation and practice. Changing customary international law is the mechanism most commonly invoked by Chinese experts to justify, in theory, how unfavorable rules will change; direct amendment or creation of treaties is another commonly cited mechanism.
[116] Wang and Wei 1981: 29-30
[117] Yuan 1986: 10
[118] *Ibid.*, 25
[119] Ling 2008: 2

discipline were necessary to wield international law as a tool to protect its sovereignty and maritime rights. Study of the law of the sea became one of the central components of international legal training in the PRC over the course of the 1980s. "So far as our country is concerned," argued one influential author (whose strong Marxist-Leninist views were further "left" than most of his colleagues and thus less amenable to international law), "[international law] is an indispensable legal means to realize socialist modernization construction. For instance, in order to explore resources near our coast, we must study the legal status of the continental shelf, fishing zone and exclusive economic zone and international norms and customs between states in delimiting these regions….we must actively join international legislative activities and strengthen the struggle with the UN so as to form the broadest international united front for anti-hegemonism."[120] Spurred by this "anti-hegemonic" motivation but lacking knowledge about the specifics of the regimes, PRC goals were initially more about process than substance; as Chinese scholars studied these particularities of UNCLOS, certain substantive problems became clear. The ratification of the treaty, however, proceeded because that act served the purpose of undermining a liberal, Western-dominated regime, an aim far more politically salient than any particular rule.

The indeterminacy built into core rules of the treaty made this decision even more easily reconciled with any potential material costs. On the question of how maritime boundaries could be delimited from the various features in the East and South China Seas subject to disputed sovereignty, the Convention provides only the sparest of interpretive guidelines. A group of Chinese legal scholars noted that "[a]fter years of discussing the concept of 'equity' in international law at UNCLOS III, the participating States could find no universally agreed

[120] Liu 1982: 5

meaning of the term. Accordingly, they settled for the broader reference to delimitation 'on the basis of international law,' and a specific indication of the objective, viz., 'to achieve an equitable solution' in Articles 74 and 83 of the Convention. However, this provision is so general that only by further interpretation can it be made practically applicable. China's position on the application of the principle of equity is also indeterminate, and subject to different interpretations, and cannot by itself be used as practical method for boundary delimitation."[121] Given the high degree of political salience attached to disputed territory, it was inevitable that a viable "practical method" would honor Chinese interpretations of the relevant rules reflecting its preference for closure. Growing familiarity with legal processes surrounding the law of the sea, especially the domestic legislation and practice of state parties to UNCLOS, led Chinese scholars to recognize that "[t]he vagueness and equivocality of the Convention is a great weakness, which can be taken advantage of by any party to the Convention."[122] With ratification, it became clear that a variety of issues would require not just distinct Chinese interpretations, but a "practical method" for realization. Lacking such a method, China was likely to be saddled with a regime that crystallized around norms disadvantageous to China – that is, conventional, liberal interpretations of the rules enshrined in the black letters of the treaty.

Recognizing the costs of the Convention and the imperative for China to influence its interpretation and practice, a Chinese researcher argues that "the EEZ and new continental shelf, which have been said to be able to expand China's jurisdiction, have actually become a true "soft underbelly" or "troublemaker" for China…it is precisely because of the new system of expanded maritime jurisdiction in the Convention that China and its neighbors are having disputes over the

[121] Yu 1995: 218-219
[122] Yuan 1984: 418

delimitation of the EEZ and continental shelf.…Thus, the argument that the provisions of the Convention and China's claims will expand the maritime space under China's jurisdiction to 'three million square kilometers' has become a purely theoretical deduction that ignores the reality of China's geography."[123] Other maritime security and regional diplomacy experts lament the fact that UNCLOS rules have now encouraged "provocative" acts by other states with claims to island territory claimed by the PRC.[124] Chinese academics also express reservations about the treaty on economic grounds, recognizing that a standard interpretation does not serve China's material interests. One scholar notes that "UNCLOS cannot achieve a Pareto optimum…as demonstrated in growing overfishing….and the huge transactions costs in signing and implementing the treaty."[125] Others question the salutary effects of joining a major treaty that lacks legal efficacy given the great powers' capacity to act unilaterally without honoring obligations under the Convention.[126] The thrust of these comments about the treaty is that the disadvantages of the treaty are substantial, and require study and ultimately revision through concerted Chinese action.

At a minimum, China's ratification of the treaty indicated to international law specialists that the law of the sea presented a variety of political challenges requiring PRC experts to wield greater practical knowledge of the regime that would soon go into effect. The manifest disadvantages of UNCLOS III would have to be managed, in part through publicizing a coherent and persuasive Chinese interpretation of relevant rules and norms. In the words of one Chinese scholar:

> We should keep abreast of current affairs and make use of this weapon of international law to expose and attack the aggressive and expansive policy of the superpowers including hegemonism. We should first oppose Soviet hegemonism. In coordinating our

[123] Yu 2012: 57-58
[124] For example, Ge 2002; Zhang 2009; Ji 2009; and Liu 2013.
[125] Ge 2002: 38
[126] Zhao 1991: 52-62.

> diplomatic struggle, we should utilize international law to safeguard our territorial sovereignty and legitimate interests. We should direct our research effort in a down-to-earth manner to such issues as our claims to sovereignty over the Xisha (Paracel) Islands, the Nansha (Spratly) Islands and the Tiaoyutai (Senkaku) Islands. Delimitation problems with our neighboring countries on the continental shelf, and in the economic zones should also be given attention. We should carefully study the various issues confronting our present day struggle in the field of international law and support the struggle waged by the Third World for the establishment of a new international order, both politically and legally. For instance, the statement made by Premier Zhou Enlai in 1971 in support of a 200 nautical mile maritime right generated an important impact in this struggle.[127]

Chinese experts appreciated that "this weapon of international law" required knowledge of its intricacies (thus the call for research efforts) and meaningful expression of that knowledge in the form of practice that would position China to participate in the struggle to shape this important "international legislation" to better reflect its interests and preferences in a closed law of the sea in which its security, sovereignty, and access to resources would be better served.

IV. Conclusion: Learning to Play the Instrument of International Law

This Chapter addressed the question left open by the interaction phase of China's participation in the transnational legal process surrounding UNCLOS III: why are PRC positions on the law of the sea incongruous with its apparent interests? In treating the second phase of the transnational legal process, interpretation, we arrive at more complex picture of Chinese interests in international law that partially answers the question. While the treaty did not serve China's conventionally-rendered material interests in power and wealth, it satisfied a desire to wrest sole control of the "instrument" of international law away from the advanced, industrial West. The UNCLOS III treaty's substance may be largely disadvantageous to the PRC, but China's conception of its interests was considerably broader than the costs and benefits delivered by

[127] Yuan 1986: 29-30

discrete rules and norms of the regime. By leading the Third World to enact a regime that defied Western "maritime hegemony," China took initial steps toward creating an illiberal regime with sufficient indeterminacy to allow China's closed interpretation of the law of the sea to serve as the basis for its future practice.

The origins of this indeterminate, illiberal perspective, and preference for closure lie in China's identity, observable in its historical and cultural-institutional background vis-à-vis international law in general, and maritime law in particular. This background manifests in part as a belief in the basic illegitimacy of the Western-dominated international legal system that facilitated China's historical "humiliation" in the unequal treaties. It manifests also in a set of governing institutions that prioritize custom (*li*) well above law (*fa*), trusting in the discretion of rulers – not the application of fixed rules – to continuously promote an idealized notion of orderly, hierarchical social relationships. Finally, mated to ideological opposition on Marxist-Leninist-Maoist grounds and strong perceptions of maritime geostrategic vulnerability, the PRC's closed interpretation is more easily reconciled to its self-perceived interests. PRC participation was premised on a purely instrumental notion of international law that differs considerably from the more normative purposes and functions of international law idealized by the Western world.

With Third World majorities in the UN and virtually all of its subsidiary organs, Chinese diplomats had reasonable success in "taking over legislative power in international lawmaking from the two superpowers"[128] at the Conference. This supposed triumph only initiated the political struggle to make the law of the sea serve China's interests: "the emergence of the Convention, as well as its universality and persistence as a 'constitutional' foundation for

[128] Yuan 1984: 423

international societal discussion of maritime and law of the sea issues, are inseparable from the Chinese contribution. However, the grim, unavoidable fact is that the EEZ and continental shelf, to which China agreed and supported, caused China serious disadvantage and distress."[129] The EEZ was only one of several substantive provisions that were not necessarily to China's advantage. Yet by contrast to prior efforts at codification, the norms that prevailed in the new Convention better addressed the legacy of unequal treaties and other disadvantages faced by post-colonial states operating in a liberal system that conferred advantages to states that were already developed. Emphasizing preferred principles like illiberalism and indeterminacy in constructing the new law of the sea, the PRC acted consistently with its interpretation of the function and purpose of international law. Having done so effectively, and having announced its interpretations of the treaty and its norms as promoting closure, the PRC still faced the question of how those interpretations would affect the practical function of the treaty and its bearing on questions of high political import, like its maritime disputes.

With this interpretative basis intact, we are still left to reckon with what it means for China to wield the law of the sea as an instrument. What are the implications of a Chinese interpretation of the law of the sea that approaches its underlying principles and norms as fundamentally mutable? Does the PRC's explicitly instrumental conception of international legal rules, lacking normative basis, influence their practical function? Interpreting international law as a potentially useful instrument is not, in itself, sufficient to guide effective use of legal instruments. This practical question demands further inquiry into the process of *internalizing* the rules and norms of UNCLOS III into China's domestic law, and *implementing* it in the form of practice.

[129] Yu 2012: 59

Chapter 4

Internalizing and Implementing International Law: The Politics of Ratified Treaties in the PRC

> "Strictly speaking, international treaties, even after ratification, accession or approval, do not automatically become part of [PRC] law and consequently do not automatically have domestic legal effect."
> - Xue Hanqin, PRC's sitting judge on the International Court of Justice[1]

The influence of international law on China, and vice versa, depends in substantial measure on the concrete ways that treaty norms emerge in PRC domestic institutions and practices. In treating those domestic manifestations of the original treaty norms, this Chapter continues the narrative tracing those norms from their creation at the Conference, through their interpretation by Chinese elites, and now finally to the doorstep of the Chinese political-legal system. The phenomenon now at hand is the transformation of the international law of the sea into the domestic maritime law of China. What are the formal and informal processes by which treaty norms enter China's legal system? How do those norms influence domestic institutions? How does UNCLOS III become PRC law, policy and practice in the EEZ? These questions bring us to examine the conjoined internalization and implementation processes, the last two stages of the transnational legal process.

Chapter 2 analyzed PRC interaction with the emerging EEZ regime established in the UNCLOS III treaty, noting China's ardent support for seemingly disadvantageous rules and procedures. In ratifying that treaty, the PRC pursued not material interests but a broader conception of an

[1] Xue and Jin 2009: 300

illiberal international legal order. Their participation was geared toward ensuring that the treaty's text remained indeterminate in several key respects, permitting Chinese discretion to push for norms allowing *closure* of maritime zones around China – i.e., exclusion of other states and consolidation of Chinese control. Chapter 3 unpacked how China came to this specific set of interests and preferences by inquiring into the historical context and cultural-institutional framework through which the PRC interpreted the treaty. China's experience of victimization by international law and sense of maritime vulnerability during the "century of humiliation" produce a hostile attitude toward international law in general, and the law of the sea in particular. The normative illegitimacy of Western international law in Chinese eyes, however, does not negate its instrumental efficacy. International law is just another arena of international politics, and in the maritime domain it enables China to pursue closure of zones along its vulnerable periphery.

Still, if law can be an instrument (of socialist modernization, of illiberal statecraft, of maritime closure, or any number of ends), then we are still obliged to specify *how* that instrument is forged within state institutions and wielded by state actors. That is the subject of the next two analytically-linked Chapters. The present Chapter 4 addresses the generic ways international law is internalized and implemented in China; these processes are further explored in Chapter 5, by way of a specific inquiry into the processes through which Chinese political-legal institutions transform the EEZ into a practical instrument to advance political goals. Through these processes, those norms reciprocally transform the PRC, creating new state functions and capacities to administer and enforce domestic law in the vast new "blue territory" of the EEZ.

Internalization is the process by which norms from international law are institutionalized within a state. It is observed in the enactment of domestic laws and regulations that declare a state's intention to comply with its international legal obligations.[2] As such, internalization proceeds through the various legislative and regulatory mechanisms by which treaty or customary law is "domesticated," or rendered in domestic law and transmitted to agents of the state. The process generates functional responsibilities to implement domestic laws derived from international legal norms. Depending upon the nature of domestic political and legal institutions of the state, many different stakeholders may be involved at different stages of the process, including political parties, legislators, government officials, courts, and non-state interest groups. Some or all of these stakeholders will be involved in agenda-setting, determining which norms require formal internalization, drafting and review, managing legal and political challenges to proposed laws, delegating and undertaking oversight and implementing authorities, and so on.

Implementation is the process by which those laws are put into practice by agents of the state. It is the informal complement to the formal process of internalization. It focuses not on "black letters" but on the observable implications of having such rules on the books. The operational element here is the individual agencies (or the actors themselves), whose conduct and relative authority are influenced by internalized rules. While there is inevitably a formal component to this process – namely domestic administrative rules about how authority is delegated and how conflicts between agencies are managed – it is principally about the informal *political* process by which new norms are expressed in observable practices. Implementation therefore depends to a

[2] Koh describes the process as one in which "states internalize international law by incorporating it into their domestic legal and political structures, through executive action, legislation, and judicial decisions which take account of and incorporate international norms" (Koh 1996: 204).

significant degree on the character of the political as well as the legal institutions of the state internalizing international law.

Part I consults the "black letters" of Chinese law to explain the formal role treaty norms play in the PRC. The weakness of China's legal institutions and the indeterminacy of China's legal procedures grant substantial discretion to political elites in deciding whether and how international legal norms become a part of Chinese domestic law. Part II considers how treaty norms are shaped by the broader political arena in which law operates, demonstrating the necessity of high-level political prioritization – first to determine which norms survive internalization and in what form, then to mate those norms with practical implementation. Part III establishes that legal issues linked maritime disputes pass through this threshold of political importance, enabling both internalization and implementation of UNCLOS norms to be championed by Chinese Communist Party (CCP) elites. The analytically-linked Chapter 5 then analyzes the enactment and practical implementation of maritime legislation, administrative regulations, and departmental rules as they pertain to the various functional demands of the EEZ.

I. The Formal and Informal Role of (International) Law in Contemporary China

In order to develop appropriate expectations for how China engages in processes of internalization and implementation, we must assess the formal and informal institutional arrangements in the PRC for incorporating norms from international treaties into domestic law and practice. Analysis of the PRC constitution(s), relevant statutes, and various precedents makes evident that these processes are irregular and determined outside of the legal institutional hierarchy. At each stage, political elites in the government and CCP exercise considerable discretion about which treaties and agreements are recognized as binding upon China, which

obligations survive the internalization process into domestic law, and how administrative and law enforcement agencies implement the laws, regulations and rules thus adopted. After consideration of the formal, legal bases for ratifying treaties, this section examines the circumscribed role of law in contemporary China, noting ongoing reform efforts to utilize law as one of several instruments of domestic governance and international statecraft.

These considerations support a conclusion that legal institutions play only a subsidiary role in political decision-making in the PRC, which should further limit expectations that norms from ratified treaties will survive internalization and implementation in unmodified form. Any "obedience" in implementation is to the transformed set of rules internalized into PRC law, not the original norms. The formal legal hierarchy is deeply penetrated by an informal political hierarchy that upsets its "rational" function to the extent that it is probably not appropriate to refer to the Chinese legal system as a "system" at all;[3] rather, it is a collection of institutions that in some respects resemble those composing legal systems foreign states, but that lack authority reposed in law itself. In consequence, political priorities like maritime disputes can and do override formal constraints imposed by legal obligation. Nonetheless, political campaigns that promote the aim of "ruling the country through law" demonstrate that PRC elites increasingly prize the value of legal mechanisms, legal language and internationally legitimated norms as instruments to pursue both generalized and particular political goals.

[3] A leading scholar of the Chinese legal system writes that "because of the lack of a unifying concept of law, and even more so because of the fragmentation of authority that marks China today, I have nowhere in this book referred to a Chinese legal system, only to Chinese legal institutions" (Lubman 2006: 3). This assessment, if not the language itself, is widely shared among students of Chinese law in China and abroad. Another authority on Chinese law notes that "as a practical matter, there is no single source of ultimate authority in the system. Indeed, to make this claim might be the equivalent of saying that there is no single Chinese legal 'system,' that there are instead many Chinese legal systems, each with its own jurisdiction, hierarchy of authority and way of operating" (Clarke 2005: 64).

Formal processes for "bringing international law home"

As a jumping off point into China's legal institutions, we should consult the black letters of its basic procedures for "bringing international law home"[4] If we are to assess the indeterminacy that characterizes the law as it operates within China, these formal elements are certainly among "the various processes by which institutions are continually reproduced and modified through…actors' practices."[5] By attending first to the prescribed steps under law and noting where they fail to determine exactly how actors and organizations are charged with internalizing and implementing international law, the groundwork is laid for examining the actual practices that emerge. How does international law figure into the formal hierarchy of PRC legal institutions?

A PRC constitution that does not constitute

The first step to mapping the internalization process is to identify the formal domestic procedure for incorporating ratified treaties. What does the most authoritative source of law in the PRC legal hierarchy, its national constitution, have to say on this issue? Very little, it turns out. The most recent iteration of that document was promulgated in 1982, and represents the fourth constitution in the short history of the state. Like the prior 1954, 1975 and 1978 PRC constitutions, the 1982 constitution is characterized by a large volume of ideological language and relatively spare description of the structure and authorities of the state. Each begins with a preamble reciting the CCP's creation myth about the PRC, recounting China's exodus from "semi-colonial" and "semi-feudal" bondage and its deliverance to socialist modernity under the

[4] This is the title of a seminal lecture by Koh focusing on the internalization process and linking it directly to obedience (Koh 1998).
[5] Koslowski and Kratochwil 1994: 227

"revolutionary leadership" of the Chinese Communist Party. It lauds the "marked increase in agricultural production" as well as "significant advances" in "education, scientific and cultural undertakings," and reaffirms its pledge to the "Five Principles of Peaceful Coexistence," (Preamble, 1982 PRC Constitution) a proxy for China's overall attitude toward inviolable sovereignty as the heart of the international legal system. Amended in 1988, 1993, 1999, and 2004 to match then-prevailing political priorities, the current constitution is better conceived as a relatively authoritative statement about the current policies and political mood of the CCP.[6]

Only secondarily does the constitution lay out "the basic system and basic tasks of the State" by establishing "the fundamental law of the State" (Preamble, 1982 PRC Constitution). International law does not figure prominently. In four chapters and 138 articles, the constitution addresses international law in only three articles: Article 67, which provides that the Standing Committee of the National People's Congress (NPC), the leadership of China's supreme legislative body, will "decide on the ratification or abrogation of treaties and important agreements concluded with foreign states;" Article 81, establishing that the President, following the NPC decision, "ratifies or abrogates treaties and important agreements concluded with foreign states;" and Article 89, which grants the State Council, China's executive cabinet, authority to "conclude treaties and agreements with foreign states." Nowhere in the text are "treaties" or "agreements" defined, and nowhere does the constitution stipulate any specific procedure by which international law bears on domestic law or creates any type of binding legal

[6] The history of the prior constitutions bears out this judgment: the 106 articles of the 1954 document codified the CCP's revolutionary success in seizing power in China and forging a socialist state; the 1975 edition followed Mao's Cultural Revolution and consists of only 30 vague clauses that exhort the nation to continuous revolution, abolishing virtually all of the individual rights contained in the 1954 document and placing the state directly under the CCP in formal terms; the 1978 constitution came on the heels of the ouster of the Gang of Four and reversed the radical tendencies of its immediate predecessor; finally, the 1982 constitution deleted the explicit control of the CCP and reoriented the state organs around the urgent tasks of socialist modernization and development of a market economic structure.

obligation for the state. The President, State Council and NPC appear to have broad, almost undifferentiated authority to make decisions about the degree to which international law will matter.

The constitution's indeterminacy is tantamount to silence on the subject of international law. It reflects a basic ambivalence among Chinese elites about the purpose and function of international law within the PRC, though it bears noting that this is not at all a settled subject even in countries with comparatively rigorous legal systems. Western international law scholars usually identify two basic "theories" of international law: monism and dualism. A monist conception of international law considers law as a unified whole, in which "international law is automatically a part of a state's domestic legal system."[7] The dualist position is that domestic and international law are "essentially different bodies of law" in which the "state determines for itself whether, when, and how international law is 'incorporated' into domestic law, and the status of international law in the domestic system is determined by domestic law."[8] Where many countries elect to follow a clear monist or dualist doctrine in their constitutions or other major legal instrument, China's constitution scrupulously avoids pronouncements on this subject. Leading Chinese international law scholars maintain studied ambivalence about where the PRC sits along the monist-dualist spectrum.[9] There is no default presumption about the status of

[7] Dunoff, Ratner and Wippman 2006: 267. See also Frank and Thiruvengadam 2003 for a helpful survey of varying constitutional orders vis-à-vis international law. They argue that "States, as a matter of practice, make a deliberate decision as to whether to approach the international legal system from the dualist or monist perspective. That choice will have important ramifications for the state's legal order and its relation to the community of states," (Frank and Thiruvengadam 2003: 470) though such a deliberate decision has been deferred in China and cannot be clarified by a constitutional court, because no such authority exists.

[8] Dunoff et al. 2006: 268

[9] Wang Tieya, the most widely read and taught international law scholar in China, merely lays out these categories and declines to describe China as falling into one or the other category (Wang et al., 1981: 44); Zhou Gengsheng (1981) rejects these choices as a false dichotomy (cited in Chiu 1987: 1145-1146). Contemporary scholars inherit this ambivalence, some staking out a position that there are two distinct systems of law but that domestic law remains subordinate to international law (Jiang 2014: 43-45); Others argue that the system is in fact monist, but that the state retains discretion to incorporate only selected international legal norms (He 2001: 50). In author interviews with international law professors at Tsinghua Law School (June 2014, December 2014), they explained that China's

international law in the Chinese constitution, and no audible calls for more determinate relationships to be established in future amendments.[10] The same indeterminacy reigns in lower-level legal instruments' treatment of the subject of international law.

Indeterminate statutory terms for internalization of international law

The next step in mapping the formal internalization process is to look one step down in the legal hierarchy. Legislation (立法) created by the NPC, the "highest organ of state power" (1982 PRC Constitution, Article 57), is the next-most authoritative source of law in the PRC. The NPC is an appointed legislative body that convenes only once annually. It holds nominal authority to amend the constitution as well as enact and amend "basic laws" (基本法), which are binding on all other organs of state and hierarchically superior to legislation enacted by People's Congresses at provincial, autonomous region, municipal levels. The NPC's Standing Committee, a permanent body, is also empowered to enact "other laws" (其他法律), and to amend basic laws (1982 Constitution, Article 67). At this level of national legislation, several statutes make pronouncements about how international law should function in PRC domestic law in certain functional areas, but do not establish a default norm for application to treaties or custom.[11]

Internalization does not have a determinate pathway through China's legal institutions. Xue Hanqin, the PRC's sitting judge on the International Court of Justice, confirms that "[u]nder Chinese law, there is no statute that explicitly regulates the forms or modalities for implementing

system is *sui generis* and that students are taught to treat such distinctions as monist-dualist as Western imports that do not have direct bearing on China. Others, including Judge Xue, argue that both exist simultaneously (Xue and Jin 2009: 305).

[10] One scholar notes that "China has not established a general rule on the reception of international treaties within the Chinese legal system and the direct applicability of these treaties before Chinese courts," arguing that such rules are unnecessary because the system functions without such determinacy (Shan 2002: 564).

[11] Guo 1988 provides a highly detailed review of the de jure legislative hierarchy, and characteristic of Chinese scholarship on the subject, notes but does not explore the undefined role of international law.

treaty provisions at the domestic level or in national courts."[12] She further notes, "as is obvious, treaties vary in terms of their status and legal effect on the domestic legal system; *not all treaties constitute part of [China's] domestic law*."[13] This statement reflects a basic indeterminacy on the question of what sorts of instruments ought to be considered positive sources of international law requiring domestic legal effect. Consistent with this ambivalent attitude toward what should actually be considered international law, Wang Tieya's authoritative work on the subject elides distinctions between formal treaties ratified through legal processes and informal agreements undertaken among politicians. He includes the 1972 Shanghai Communique between the U.S. and the PRC as an agreement of equal standing with a treaty, though it was not treated so by the U.S. or the international community.[14] The lack of a basic definition of what "counts" as international law is problematic, and pervades all legal processes naming "international law" as though it had determinate content.

This problematic conceptualization of the basic nature of international law is amply reflected in PRC statutes. The most significant piece of legislation on the subject is the 1990 PRC Law on the Procedure of the Conclusion of Treaties (Treaty Law).[15] That no formal procedure for incorporating treaties existed prior to 1990, despite a long-standing practice of ratifying international treaties dating back to 1949, speaks volumes to the non-essential role of formal laws in the conduct of the Chinese state.[16] The Treaty Law is "applicable to bilateral or

[12] Xue and Jin 2009: 305
[13] *Ibid.*, 300, italics added.
[14] Wang 1984: 195; See Also Kim 1987: 130-148
[15] Full text available at: http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383893.htm
[16] According to conflicting data from the 世界只是年鉴 [World Knowledge Yearbook] and the 1990 中国通就年鉴 [Statistical Yearbook of China] (available by year at http://tongji.cnki.net/overseas/brief/result.aspx), by 1990 China had signed somewhere between 113 and 150 multilateral treaties and anywhere from 48 to thousands of bilateral treaties. This divergence reflects the lack of a consensus definition about what counts as a treaty and what processes must occur for it to be considered "ratified." In interviews with Tsinghua University and Peking University law professors in August and November 2014, different scholars suggested that the process was conducted by the NPC,

multilateral treaties and agreements and *other instruments of the nature of a treaty or agreement* concluded between the People's Republic of China and foreign States" (Treaty Law, Article 2, *italics added*), restating the constitutional ambiguity on the subject of what, properly, may be considered a treaty.[17] Article 3 goes on to enumerate the various powers established in the 1982 Constitution (for conclusion, ratification and abrogation), and authorizes the State Council, with its mixed executive and legislative powers, to manage most other parts of the process, from negotiating and drafting to formally concluding the treaty. Through its diplomatic organ, the Ministry of Foreign Affairs (MFA), the State Council is also empowered to "administer specific affairs concerning the conclusion of treaties and agreements with foreign states" (Treaty Law, Article 3). This broad "administration" requires further analysis, as the statute effectively grants an executive agency (the MFA) the balance of formal authority in the negotiation of the terms of the treaty, delegates to it the authority to implement the treaty, and to engage in the "execution of formalities" (Article 8) related to the treaty (depositing with the UN, publicizing, etc.).

The Treaty Law further stipulates that "the State Council *may formulate regulations* in accordance with this Law for [treaty] implementation."[18] This language is puzzling in that implementation appears to be optional ("may formulate [可以…制定]"). The statute indicates that

as suggested in the Constitution; others said that this would be impossible, and that decisions would simply have been taken by the CCP Central Committee Political Bureau; others argued that the principle organ involved was the State Council.

[17] Article 7 of the Treaty Law does offer greater specificity about the subject of the legislation, while avoiding any definition of the "treaties and agreements" themselves:

> The treaties and important agreements referred to in the preceding paragraph are as follows:
> (1) treaties of friendship and cooperation, treaties of peace and similar treaties of a political nature;
> (2) treaties and agreements relating to territory and delimitation of boundary lines;
> (3) treaties and agreements relating to judicial assistance and extradition;
> (4) treaties and agreements which contain stipulations inconsistent with the laws of the PRC;
> (5) treaties and agreements which are subject to ratification as agreed by the contracting parties; and
> (6) other treaties and agreements subject to ratification.

[18] 1990 Treaty Law, Art. 20

administrative regulations are sufficient, but not necessary, for an international treaty to take domestic effect.[19] Such an arrangement may be interpreted to mean that treaties and agreements should be presumed "self-executing" (a term used in Western legal systems to refer to a treaty whose norms immediately take effect in the domestic sphere, especially in the sense that they become *judicially enforceable*) without the need for legislative or regulatory action. However, whether or not they are enforceable by China's non-independent judiciary is not at issue here, so the Treaty Law's indeterminacy can be construed to mean that treaty norms may pass directly to administrative organs without any implementing legislation or regulation.

Yet language borrowed from the text of China's various treaties, UNCLOS among them, does in fact appear in many pieces of domestic legislation, suggesting that the 1990 Treaty Law cannot be the exclusive source of law for introducing international legal obligations into PRC domestic law. Indeed, in Article 10 the Treaty Law makes reference to unnamed other "domestic legal procedures for [a treaty's] entry into force," implying some other statutory basis for incorporating international treaties and agreements. There are, however, no clear statutes to this effect. The NPC evidently considered regulating these different pathways during the drafting of the 2000 PRC Legislation Law,[20] but "no specific proposal was formally tabled before the People's Congress, due to the complicated nature of implementing treaties."[21] It might be argued that the complicated nature of implementing treaties is in fact the *reason* that the NPC *should* have codified a procedure. It may be that the NPC preferred to do so but lacked political support.

[19] The 2000 Legislation Law of the People's Republic of China ("2000 Legislation Law") defines the hierarchy of legal rules in the PRC.
[20] Full text available at: http://www.china.org.cn/english/government/207419.htm
[21] Xue and Jin 2009: 305, fn 12

This inability to agree to precise procedures regarding international law speaks to an important quality of Chinese legal processes: there are few reasons to promulgate laws that may challenge the political prerogatives of other actors in the Chinese state and Communist Party.[22] Absent consensus from key stakeholders achieved outside of the legislative arena, the NPC has no practical authority to legislate. This arrangement amounts to a preemptive executive veto. That veto is not held only by the office of the executive as a defined power, but as an ill-defined but ever-present possibility intrinsic to the informal, competitive and unregulated political system as a whole. This political priority shines through in Article 4 of the Legislation Law, which affirms that laws "shall be made…on the basis of the overall interests of the State and for the purpose of safeguarding the uniformity and dignity of the socialist legal system." Such a vague, hortatory declaration evinces thorough commitment to avoiding language that would subordinate the authority of PRC political organs to any foreign norms bearing on issues of consequence.

Those domestic statutes that do touch upon international law do so in highly circumscribed, ad hoc fashion. Reading across various PRC legislative provisions and normal practices, Chinese legal authorities discern "three forms or modalities to implement treaty obligations, namely, execution by administrative measures, transformation of treaty obligations, and direct application of treaties under specific national legislation."[23] These pathways span everything from a determinate need for new or revised legislation to incorporate treaties, to an informal expectation that agencies, courts, and private actors will simply treat these international norms as binding.[24]

[22] Li 2007: 341-344 provides a summary of much of the writing in this subject; an earlier, more comprehensive study by Tanner 1999: 12-40 also treats the various models of Chinese lawmaking processes.
[23] Xue and Jin 2009: 305.
[24] In the case of UNCLOS, each of these three modalities appears to be in effect. We have seen no action on certain obligations, new legislation on others (e.g. the 1998 PRC Law on the EEZ and Continental Shelf, analyzed in depth below), and no legislation but implementing regulation and rules on others.

In effect, the existence of multiple pathways but no rule for choosing between them has meant that some international laws trump some PRC domestic laws some of the time, and vice versa.

While there is no general rule, law covering certain functional areas touches upon the appropriate way to reconcile conflicts between Chinese domestic law and treaty law. These statutes and regulations tend to retain a discretionary "off-ramp" for executive agencies to ignore such conflicts when higher political priorities are in play. The 1986 General Principles of the Civil Law of the PRC (Civil Law) states in Article 142 that "application of law in civil relations with foreigners shall be determined by the provisions in this chapter. If any international treaty concluded or acceded to by the People's Republic of China contains provisions differing from those in the civil laws of the People's Republic of China, the provisions of the international treaty shall apply, unless the provisions are ones on which the People's Republic of China has announced reservations."

Three observations from this important article are warranted: (1) it limits the scope of application of this rule to "civil relations with foreigners," a specific class of legal interaction (i.e., a "rule of conflict") that does not include most legal issues; (2) it assigns higher legal priority to treaty law in cases of difference with domestic law, indicating that treaty provisions may be directly applied without additional legislation; and (3) it dramatically limits the scope in which treaty norms trump domestic ones by referring to "reservations" by which that effect can be averted.[25] Identical constructions appear in the 1989 Law of Administrative Procedure (Article 72),[26] the

[25] Reservations are permissible in some treaties, provided they do not undermine the intent and purpose of the treaty. UNCLOS III forbids any reservations, though the PRC issued several (discussed in Chapter 2).
[26] Full text available at: http://www.china.org.cn/english/government/207335.htm

1991 Civil Procedure Law (Article 238),[27] 1993 Maritime Procedure Law (Article 268),[28] the 1999 Special Maritime Procedure Law (Article 3),[29] and the 2000 Marine Environmental Protection Law of the PRC (Article 97), among others.[30] Other statutes refer to international treaties (or international "practice," perhaps referring to customary international law) and domestic law without making clear hierarchical distinctions between their applicability when they are in conflict.[31] Alternatively, statutes like the 1997 PRC Criminal Law, allow for norms in international treaties to supplement existing Chinese code where the crimes in question are not described, but rely on the criminal procedure of the PRC (rather than the international norms criminalizing the act). Without describing how these conflicts are supposed to be resolved, nor specifying even which agency or institution makes such a decision, the typical PRC statute touching on international law implicitly permits the state organs with most at stake to use their discretion in enactment and enforcement.[32]

This mode of dealing with domestic and international law conflicts confounds systematic legal analysis. Even among PRC international law experts, consensus exists that there is no default rule about the application of treaty law, and the relevant procedure must be considered on a statute-by-statute or sector-by-sector basis.[33] Where there are treaty obligations that cover sectors that include substantive areas of law for which no domestic law already exists, Chinese

[27] Full text available at: http://www.china.org.cn/english/government/207339.htm
[28] Full text available at: http://www1.lawinfochina.com/display.aspx?lib=law&id=191
[29] Full text available at: http://www.npc.gov.cn/englishnpc/Law/2007-12/11/content_1383565.htm
[30] Full text available at: http://www.npc.gov.cn/englishnpc/Law/2007-12/13/content_1384046.htm
[31] e.g., 1982 Trademark Law, 1984 Patent Law, 1985 Law of Succession, 1986 Fishery Act, 1986 Postal Law, 1992 Maritime Law
[32] Full text available at: http://www.npc.gov.cn/englishnpc/Law/2007-12/13/content_1384075.htm; this interpretation was laid out in "Decision of NPC Standing Committee" (23 June 1987) 21st Session, 6th Congress, *NPC Bulletin*, Issue 4.
[33] See, for example, Shao 2000: 26-28; Zhou 2004: 174-179; Jia 2009: 98. This interpretation was presented by a Chinese law professor in an international law class at Tsinghua University in December 2014.

practice for the most part shows that new legal questions "require special internal legislation to be transformed into domestic law and applied indirectly."[34] There remains, however, no procedure nor any uniform practice for the practical enactment of legislation to cover new substantive domains of law – as is the case in the EEZ. Legal institutions themselves do not determine when, how and even *whether* to incorporate ratified treaty norms into domestic law.

In light of this indeterminacy, one PRC legal scholar suggests only that when China "formulates domestic law it should take international legal requirements into consideration (考虑打国际法的要求)."[35] "Consideration" falls far short of a binding, defined prescription. By this logic, in omitting to formulate domestic law – which is after all only optional – certain international legal requirements may be ignored without violating any domestic rule. The words of Judge Xue capture the basic indeterminacy of China's rules for adopting international legal obligations: "[t]he Chinese constitution and basic laws do not contain any provision on the legal status of international treaties and their hierarchy in the domestic legal system. Strictly speaking, international treaties, even after ratification, accession or approval, do not automatically become part of national law and consequently do not automatically have domestic legal effect."[36]

So lacking any clear statutory basis, and given the remarkable weakness of the PRC judiciary, the only positive source of law that categorically obliges China to respect its treaty and

[34] Xue and Jin 2009: 305. An example is found in Article 36 of 1985 Law of Succession of the PRC, which stipulates: "Where treaties or agreements exist between the People's Republic of China and foreign countries, matters of inheritance shall be handled in accordance with such treaties or agreements." (Full text at: http://www.fmprc.gov.cn/ce/cgny/eng/lsqz/laws/t42224.htm).
[35] Jiang 2014: 45
[36] Xue and Jin 2009: 301

customary law obligations may be *pacta sunt servanda*.[37] This general principle of international law amounts to a promise to honor treaties in good faith because contracts *should be* honored in good faith. *Pacta sunt servanda* is binding in the international sphere mostly as a matter of reciprocity rather than enforceable sanction.[38] Chinese representatives reiterate the PRC's commitment to this obligation in frequent pronouncements by political authorities that China respects and upholds international law, especially the UN system. This commitment, however, relies on the state demonstrating its intent to practically perform its treaty obligations. As the PRC representative to the UN's Third Committee announced to his colleagues, "[p]ursuant to its legal system, once China had ratified or acceded to an international treaty and the treaty had entered into force, there was no need for additional domestic legislation to give effect to the treaty."[39] Such a declaration of intent, however, is not adequately supported by the black letters of PRC law, nor reflected uniformly in PRC practice.

While it is itself an international treaty, perhaps the strongest legal instrument confirming China's obligation to adopt domestic law consistent with its treaty obligations is the 1969 Vienna Convention on the Law of Treaties (VCLT), to which China has been a party since 1997 and in which the *pacta sunt servanda* norm is expressly articulated. That authoritative multilateral convention states in Article 27 that "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." The same treaty, nonetheless, in Article 46 grants the sovereign discretion to invalidate its consent to a treaty if it concerns "a rule of its internal law of fundamental importance." China's domestic legislation on the law of the sea routinely

[37] Interview with Tsinghua Law School professor (New York City April 2015).
[38] There is a large body of work on the purely international component of compliance that need not be addressed here in a discussion of how domestic institutions are involved in that process. Hathaway 2005, Guzman 2008, and Simmons 2009 provide strong summaries of the existing scholarship on this subject.
[39] Zhang Kening, PRC UN rep to UN Third Committee A/C.3/46/SR.41 (14 November 1991)

comes into tension if not outright conflict with UNCLOS treaty obligations, touching on questions of sovereignty and development that are plainly enshrined among China's designated issues of "fundamental importance." Capturing this process requires extension of our analysis to encompass how international law functions at lower levels in the Chinese legal hierarchy, where the political discretion of administrative agencies tasked with implementing law comes to bear.

The overwhelming discretion of administrative agencies to manage internalization

Lacking a clear, determinate procedure by which international norms must be internalized into domestic law, the balance of authority and discretion in such matters falls to the implementing agencies. This fact makes the separation between internalization and implementation purely an analytical convenience: in practice, the two are intimately linked. The nature and extent of internalization depends upon the discretion of the agents of implementation. The appearance of black letters in PRC code referring to nominally internalized treaty law is meaningful to the extent they are further specified and put into practice by lower-level organs. In effect, the State Council and its various administrative, regulatory, and law-enforcement agencies and commissions are in position to decide if and how treaty law becomes a practical reality. Because of the generalized indeterminacy of domestic laws, they are also empowered to adjust how the laws are put into practice in accordance to changing political demands without a necessity for revision or amendment of the enabling legislation and implementing regulations.

Formally, the State Council is the "executive body of the highest organ of state power; it is the highest organ of state administration."[40] In addition to its executive function, the State Council possesses substantial legislative powers: under Article 89 of the Constitution, the State Council

[40] 1982 PRC Constitution, Article 85

may "adopt administrative measures (办法), enact administrative rules and regulations (行政法规) and issue decisions (决定) and orders (命令) in accordance with the Constitution and statutes." While these legal instruments are, in theory, inferior to legislation enacted by the NPC, the Legislation Law (Article 86) is vague and perhaps contradictory in allowing the State Council to issue administrative regulations on matters that are not covered by statutes nor expressly delegated to it.[41] In practice, the State Council and its subsidiary bodies are in a position to implement policy and then, if so desired, advise the NPC Standing Committee to draft and enact laws that retroactively justify their conduct. Prior to a legal reform campaign initiated only in the late 1990s, even this perfunctory nod to the necessity of legal authorization was not commonly employed. There is no meaningful role for the judicial review envisaged in any of the major acts of legislation, meaning that when the State Council does not request legislation authorizing its regulatory and administrative decisions, they cannot be legally challenged.

Subordinate to the State Council are a host of other state bodies with legislative and regulatory authorities granted under the Legislation Law. Provincial-level People's Congresses, the People's Congresses of "relatively large cities," and the Standing Committees of these People's Congresses adopt local regulations (地方性法规) as well as resolutions (决定) and decisions (建议); autonomous regions adopt autonomous regulations (自治条例) or separate regulations (单行条例); special economic zones (SEZs) adopt regulations (法规); and State Council ministries and commissions, as well as provincial-level people's governments, issue rules (规章). While the hierarchy among these is laid out in the Legislation Law, each depending upon statutory

[41] Corne 2002: 373. The State Council, in cases of regulations that conflict with laws, may make "recommendations" to the NPC Standing Committee about how to prioritize between competing rules. See also Hand 2013: 166.

authorities granted by the NPC, the relative authority of these various legal instruments is subject to perpetual contestation.[42]

The Constitution and NPC legislation do little to remedy this incoherence – characterized, as they are, by "principle-like pronouncements, vagueness and ambiguity, broadly worded discretions, undefined terms, omissions, and general catch-all clauses."[43] The Constitution, in particular, fails to make clear the limits on law-making authority among the various law- and rule-making organs; Article 90 allows State Council ministries to make rules "within their own authority," yet neglects to define that authority. In effect, that authority lies in their practical wherewithal to implement policy – to act first and ask questions later, if at all. The indeterminacy of national legislation leaves State Council leaders (especially those heading specialized ministries and commissions) to determine their own responsibilities in line with their expectations of political efficacy and self-assessed risk of political challenge by superior bodies.

The upshot is that the State Council and its various ministries and commissions exercise substantial discretion in determining how international law is implemented. They are able to act without statutory authorization where the law is silent, indeterminate or incomplete, as it is in many substantive areas in which China has entered treaty arrangements. Generally, politically sensitive issues are not subjected to constraining law or regulation, at least not until long after a political outcome has been reached and law can be safely enacted without risking non-compliance or subversion by party elites, or stakeholder administrative agencies and the actors

[42] Each of these bodies also issues unofficial "normative documents" (规范性文件), which further muddy the waters of legal authority.
[43] Corne 2002: 374

they regulate.[44] According to one long-time Western practitioner of law in the PRC, "[a]dministrative bureaucracies under the State Council have long dominated the process of governance in China, to the extent that administrative decision making often eclipses the law-making authority of the NPC system."[45] Unlike the reasonably well-publicized legislation issued by the NPC, these administrative agencies are under no obligation to make their work transparent, and therefore routinely amend, abridge, or create regulations and rules to adapt to immediate demands without any possibility for judicial review of unlawful administrative practices.[46] The authority to make such legal decisions is not codified in any statute, but is rather a product of the political system that dominates and penetrates legal institutions at every level, with the CCP at its apex – fully "above" the legal hierarchy.

Party politics in command of internalization and implementation

The preceding discussion laid out an indeterminate set of formal processes by which treaties become a part of PRC law and are conveyed as commands from the center to to state organs. The authority to make practical determinations of when and where a treaty norm becomes meaningful – including the interpretation of the meaning of the norm – lies with state agencies dominated by the Chinese Communist Party. The legislative, regulatory and administrative hierarchy described

[44] "Structurally, China's bureaucratic ranking system combines with the functional division of authority among various bureaucracies to produce a situation in which it is often necessary to achieve agreement among an array of bodies, where no single body has authority over the others" (Lampton and Lieberthal 1992: 8). For example, the seven-year drafting process of the 2000 Legislation Law (1993-2000) speaks to the political complications entailed in promulgating any generic law that will bear on a wide range of stakeholders. See Paler 2004: 303-309.
[45] Potter 2013: 60
[46] "There is as yet simply no concept, as exists in some Western legal systems, that law or delegated legislation can be struck down [by courts]" (Corne 2002: 375). There have been some legislative measures that afford the courts some de jure authority to hear complaints against administrative decisions (e.g., the 1990 Administrative Litigation Law and the 1991 Civil Procedure Law), but even these formal statutes are badly compromised by their indeterminate drafting and deliberate loopholes (Party decisions cannot be reviewed, nor can discretionary decisions by administrative officials, nor any actions that are outside the scope of official duties, nor where the complainant has been judged to cause any harm, nor "under other circumstances prescribed by law." See Potter 1999: 683.

above is penetrated at every level by the CCP. Because the leaders in these state organizations are themselves typically CCP members with party roles and loyalties (or at least share responsibility with a Party Secretary), they are unlikely to accept adverse legal consequences based on what appears to be a secondary set of legal rules. Legal norms are inferior to the political norms of the Party, which has its own constitution and rules.[47]

This subordinate status for law is not surprising; in fact, the greater surprise would be if the relatively brief campaign to introduce legal institutions over the past few decades had subverted long-standing structures of power and authority in Chinese society and, more recently, in the CCP. Legal institutions, after all, were never the principle instruments of governance in imperial China. They were still less so during the early period of the PRC, and were rejected entirely during the Cultural Revolution in favor of ephemeral party norms. In the post-Mao era, the demand for market-based economic development helped resuscitate legal institutions in certain significant ways, but the architects of that reform have never embraced the law as a substitute for better-established and more robustly institutionalized modes of social control embodied in the party and society. There is little scholarly debate that "[l]aw is not a limit on the party-state, but rather is a mechanism by which political power is exercised and protected."[48] The CCP dominates the state apparatus, and utilizes law as a complement to its existing political power, exercising a monopoly that persists despite – and perhaps even because of – a lack of legal authority.

[47] Indeed, there is an argument to be made that the law is largely "epiphenomenal" to observed changes in the actions of administrative agencies. One empirically thorough study develops a set of criteria for judging whether or not the law, per se, is the independent variable "causing" various administrative outcomes and concludes that "we have not uncovered solid empirical evidence showing whether a formal Chinese law has any significant *independent* effect on the behavior of implicated parties" (Li 2014: 128).
[48] Potter 1999: 674

Among the post-1978 reform initiatives to "achieve socialist modernization" and develop economically was a concerted campaign to establish a viable legal order. A series of reforms grafted legal institutions onto a political system that long existed and operated independent from law, and could continue to do so even alongside imported legal constraints. Soviet and then European and American models of legal order furnished the basic rules and structure of the emerging legal order of the PRC, but none of the liberal norms of individual rights and institutionalized constraints on arbitrary exercise of state power survived internalization into Chinese legal forms. This discussion of the political overlay on PRC legal institutions in the post-Mao period focuses on reforms promoting legally-coordinated bureaucratic and administrative processes, framing the institutional context in which the EEZ enters Chinese law and practice.

The 1975 and 1978 PRC constitutions both affirm that the CCP stands astride the legal order: "the Chinese Communist Party is the core of leadership of the whole Chinese people," announces Article 2 of the 1975 and 1978 documents. The 1982 Constitution's seeming reversal on this matter[49] should not be taken as a repudiation of the dominant role of the CCP in the lawmaking process, only a reflection of the CCP's revised assessment of the efficacy of law as an instrument of governance in a state transitioning from a planned to a market economic system. Reforming the PRC legal system to be more compatible with international legal norms – especially those concerning trade and investment – became a major goal of the post-1978 "reform and opening" period. The limited scope of these reforms and the continued primacy of

[49] 1982 Constitution, Chapter 1, Article 5 states: "No organization or individual is privileged to be beyond the Constitution or other laws."

the CCP should be considered fundamental factors in understanding the narrower processes of internalization and implementation of the law of the sea.

The CCP controls appointments of the agents of the state charged with formal legal responsibilities. Through a variety of mechanisms, the Party can dictate legal instruments for use toward political objectives determined by Party leaders, who often hold dual roles as state officials and bureaucrats. This symbiosis is most clearly realized in the CCP's political-legal committees (政法委) at central, provincial, municipal, and local levels, which "supervise" legal affairs including public security, courts, prosecutors (the "procuratorate"), and, at a minimum, play agenda-setting and veto roles in the development of legislation, regulation and rules at all levels.[50] Party authority operates through official "guidance" in the form of political and ideological campaigns, formal control over personnel and promotions, and informal, interpersonal connections (关系) that permeate the entire bureaucratic and administrative edifice in varied ways, depending on the locality and personalities involved.

The mechanisms of control are largely informal, but as legal reforms devolved more decision-making to bureaucrats and administrators, the Party took pains to codify some of them. In a 1991 document called Certain Opinions on Strengthening the Party Leadership over the State Legislative Work, the CCP claimed an explicit authority to weigh in on lawmaking in the following ways: "(a) amendment of the Constitution, major laws in the political area, specially major laws in economic and administrative areas, should be examined and reviewed by the

[50] There are many dimensions of CCP control of legal processes. One author summarizes the "four dominant organizational forms" in which the Party dominates the lawmaking process: "organizational penetration of the NPC leadership and control over key NPC appointments through the NPC Party Group system and the *nomenklatura* [personnel] system; control over meeting agendas, as well as heavy influence over the general tone of legislative debate; organizational oversight of legal drafting…; and [CCP Central Committee Political Bureau] and Secretariat pre-approval of draft laws to be promulgated by the NPC" (Tanner 1999: 56).

Political Bureau and the Party Congress before they are referred to the NPC; (b) the drafting of laws in the political area should be approved by the Party; (c) draft laws in the political area and major draft laws in economic and administrative areas, should be examined and approved by the Political Bureau or its members before they are deliberated in the NPC; and (d) the Party exercises the unified leadership (统一领导) to the law drafting work."[51] China's legal reforms have given rise to periodic surges of liberal thought in state and elite circles, expectations that CCP leadership has taken significant formal and informal measures to quell.

In short, the law (and the state officials tasked with creating and implementing it) are not autonomous, and the legal hierarchy in which they operate is meaningful only to the extent it is reinforced by the more fundamental hierarchy established within the Party itself, "the locus of all important political and legal decisions."[52] The growing array of legal institutions in China are not nearly as robust as the party-state political institutions that they notionally constrain.[53] The laws are designed to avoid outright conflict with more fundamental political choices undertaken outside of legal institutions. Indeed, China's indeterminately drafted, irregularly applied law is "remarkable for its lack of institutional anchoring. Like the policy documents it has come largely to replace, it appears expected to be read as a set of hortatory instructions by those it regulates (and not just their lawyers), and continues…to contain broad statements of policy and legally unenforceable norms."[54] State officials bound nominally by that law act primarily as surrogates of the party, and remain subject to political decisions undertaken outside the reach of courts or other institutional checks. Critically, however, some of those political decisions have tended

[51] Zou 2012: 150
[52] Creemers 2015: 109
[53] In consequence, from an analytical standpoint "accurate detecting, measuring, and reporting of any behavior modification caused by a statutory change, independent of the influence of non-legal variables, is an inherent challenge to any study of the effects of a formal legal change, especially in the Chinese context" (Li 2014: 127-128)
[54] Corne 2002: 396

towards giving *greater authority* to legal institutions, largely because of law's propensity to promote orderly administration and enhance the legitimacy of CCP rule.

II. The Domestic Political Utility of International Law

The fact that legal institutions do not fully determine the process by which treaty norms are internalized and implemented in the PRC does not, in itself, diminish the importance of the black letters of the law. While the formal hierarchy of Chinese legal institutions is compromised and even subverted by political authority to which it is subjugated, there are ample reasons to pay close attention to the frequent, high-level invocations of law as a means, or instrument, of state policy. The steady increase in elite political attention to the project of creating a political-legal system to facilitate "ruling the country by law" (依法治国), accompanied by massive reforms to administrative and law enforcement agencies, provides strong evidence in support of the idea that law matters in any explanation of Chinese maritime conduct. Law is not intrinsically important as a command that constrains the state – rather, it enables the Party center to set defined goals and communicate them to lower-level actors. When a political judgment is reached that the law matches or advances policy ends, it provides a relatively efficient vehicle for their realization.

Reforming the legal system to support state affairs – including foreign policy goals related to maritime disputes – has been exactly such a high political priority for the last three generations of CCP leadership. This section identifies key Party and state initiatives to entrench "ruling the country by law" as a central pillar of governance in the contemporary PRC, and demonstrates the transformative effects of this reform effort on the way the state is organized to pursue political goals. It is in this context that international treaty norms, internalized as law, become a part of

the repertoire of state agencies charged with its implementation. Such norms enable the state to more precisely define the domains of its competence, and in the case of maritime law, to transform state functions for the purposes of administering and enforcing those aspects of the law of the sea that survive the internalization process and become part of the state agenda.

Ruling the Country By Law (依法治国)

Deng Xiaoping and other CCP elite who survived the purges and instability of the Cultural Revolution took the decisive, early steps toward imposing rules on some of the arbitrary politics that nearly consumed the party-state during that tumultuous period. On the eve of the watershed Third Plenum of the Eleventh Central Committee of the CCP in December 1978 (in which Deng and his reform-minded allies consolidated their control over the party-state), an ascendant Deng told a CCP Working Conference: "We must strengthen the legal system in order to safeguard the people's democracy. We must make the democracy systematized, legalized, and ensure that this system and its laws are immune to the changes of leaders and to shifts in the leaders' opinions or focus."[55] Whatever the normative (or even psychological) components of the decision, the instrumental purpose of these reforms mirrored that of China's contemporaneous warming to international law: law would enable socialist modernization to proceed.[56] Not only did legal reform hold the prospect of diminishing political instability, but it was deemed essential to the establishment of markets and creation of an economic system receptive to foreign investment.[57] A legal system akin to those in the industrialized West was the established "best practice."

[55] Deng 1978: 146
[56] Recall discussion in Chapter 3 on a reevaluation of international law as a useful instrument of modernization.
[57] One volume written by Western China law scholars expounds on the prevalence of the "rights hypothesis" in China during this era, which holds that "economic growth requires a legal order offering stable and predictable rights of property and contract" (Clarke et al 2008: 421).

Among many consequences, the ongoing legal reform campaign has created a stable political norm that international legal obligations like UNCLOS III would be internalized and implemented according to something resembling a legal procedure.

By the 1990s, the third generation of CCP leadership under Jiang Zemin adopted the concept of "ruling the country through law" (依法治国). This agenda satisfied the various stakeholders within the party-state committed to establishing a more reliable institutional framework within which reforms to promote economic development could take root. First uttered at the Fifteenth National Party Congress in 1997,[58] and later enshrined in a 1999 amendment to Article 5 of the 1982 Constitution, this awkward formulation reposes significantly less power in legal institutions than does the idealized "rule of law," which places the state itself in a subordinate role to the legal system and implies a liberal order in which individual rights are paramount. That cynical Western "weapon" was and remains anathema to Chinese elites.[59] To Chinese scholars, "ruling the country through law" is a carefully-crafted variant of the traditional Chinese "Legalist" conception of "rule by law" (法治), typically counterposed as a superior alternative to the wholly arbitrary "rule of man" (人治).[60] Though sharing both the cognates of "rule by law" and the connotation of legalized governance, the "ruling the country through law" concept highlights Party supremacy over the legal process through which the state governs. State organs are

[58] Jiang 1997

[59] The authoritative CCP mouthpiece the People's Daily (人民日报) published an editorial noting that "There is a debate as to what kind of road rule of law construction should take in our country. Hostile forces [敌对势力] take rule of law as their own "weapon," hyping Western rule of law concepts and rule of law models, their objective being to use "rule of law" as an opening to deny the leadership of the Chinese Communist Party and our country's socialist system. We must be clearly alert to this, increasing our strategic force and resolutely taking our own road" (People's Daily: 2015).

[60] For an extensive review of the theory and practice of rule of law, applied to Chinese reforms, see Peerenboom 2004: 55-109. For a Chinese legal scholar's explanation of the distinctions between "rule by law" and "rule of law," see see Wang 2010: 10-13. The former is a much thinner concept, and does not presuppose other liberal norms like transparency, individual rights, a constitutional order, nor prescribe any particular economic system.

subordinate to the Party, but are themselves defined by and authorized to operate within the constraints of legal institutions.

Legal reforms in this vein were intended to replace "a system of internal bureaucratic communication where the authoritativeness of particular documents was often unclear. The old system was incapable of imposing unity and order upon the process of government….A key ambition of those promoting legal reform was to bring regularity to government operations and to policymaking as a cure for the excessive devolution of power from the center and the resultant policy inconsistencies."[61] The political goal was for legal norms to help stabilize policy and strengthen expectations about its rational implementation. Law enables the Party to better coordinate the orderly operation of the government. In good Leninist fashion, law is an effective means for the head to speak to the hands and feet.

The political impetus for embarking on the "legal path" had international as well as domestic components. It is not coincidental that Jiang and CCP elites doubled down on legal reform at this juncture. During the late 1990s, China was in the process of negotiating its accession to the World Trade Organization (WTO) and faced onerous legal requirements to do so. Deepening its integration with the global economy was a high political and economic priority for Chinese leadership, and especially for Jiang's number two, Premier Zhu Rongji.[62] Like the earlier, Republican episode of developing legal institutions to roll back the unequal treaty regime, this initiative was catalyzed by an explicit demand issued by an international organization

[61] Clarke et al 2008: 377

[62] Chinese leaders explicitly linked China's accession to the WTO with domestic economic reform goals, internalizing international legal obligations as a spur to policy. For Chinese scholarly analysis of this move, and assessments of the appropriate procedures for incorporating WTO rules, see Zeng (2000); He (2001); Wu (2001).

representing foreign governments and firms.[63] Further, as in that earlier episode, the function did not necessarily follow the form. Close observers of China's legal system noted in the wake of its WTO accession in 2000 that "as a practical matter, China's WTO obligations will not become a part of its domestic law, binding on courts and government bodies, until the enactment of appropriate domestic legislation and regulations incorporating those regulations."[64] Given Zhu and Jiang's high levels of commitment to the WTO and to China's export-led growth model, the internalization of WTO norms has been fairly substantial, if uneven and incomplete. The clear political priority assigned to joining the global trading regime to promote economic development facilitated this legislative and regulatory process, ensuring that internalization proceeded at least to an extent sufficient to plausibly comply with China's onerous accession agreement.[65]

In other functional areas that promise less immediate economic impact than trade, legal reforms are hamstrung by political and bureaucratic resistance. Countless CCP and government conferences, workshops, planning documents, leadership speeches, political campaigns, and departmental rules encourage officials and cadres to redouble efforts to promote the as-yet unrealized goal of ruling the country through law. A particularly clear statement of this challenge is found in a 2004 State Council "Implementation Program for Comprehensively Promoting the Exercise of Administrative Functions in Accordance With the Law," which advocates strengthening legal reforms to discipline the administrative agencies:

> Administrative policy-making procedures and mechanisms are not sufficiently sound. Non-compliance with the law, low enforcement of the law, and failure to investigate violations of the law happen from time to time, causing significant resentment among the

[63] Cf. Commission on Extra-territoriality in China 1927, addressed in Chapter 3.
[64] Clarke 2003: 99
[65] "The instrumentalist approach to law in the PRC privileges the party-state and permits significant variation in the content and performance of specific legal and regulatory regimes depending on policy priorities. The contrast between the regime's apparent commitment to strengthening the role of law in economic transactions and its refusal to be bound by legal restraints in the management of political order reveal the extent to which law remains a contingent process" (Potter 1999: 678).

> people. Mechanisms for supervising and restraining administrative acts are not sufficiently sound; some unlawful and improper administrative acts are not stopped or corrected in a timely and effective manner; and there is no timely recourse for the harm done to the legitimate rights and interests of the parties that are subject to administrative management.[66]

Absent overwhelming consensus among Party and state elites about devolving their specific political authority to legal institutions, China's best efforts to "rule the country through law" are frustrated by an array of pathologies rooted in the vast scale of the state's governance enterprise, its decentralization and resulting pattern of local autonomy, and its weak legal institutions.[67] "Perfecting" the legal and administrative processes desired for more orderly operation of the state is a political priority that, ironically, is likely unattainable precisely because of the Party's felt need to maintain its discretion over any and all legal reforms. Unwilling to relinquish authority to ignore, revise or distort laws and regulations inconvenient for immediate circumstances, the Party ensures that the scope and depth of legal reforms will remain marginal.

Nonetheless, political efforts to advance that slogan continue, and are periodically promoted in State Council white papers,[68] Party newspaper editorials, Party study groups, and most recently, in a renewed campaign, announced at the Fourth Plenum of the Eighteenth Party Congress in October 2014, to promote "ruling the country through law" as one of the Party's four highest governance objectives (Xi Jinping's "Four Comprehensives" [四个全面]).[69] Among the priorities

[66] Cited in Lubman 2006: 86

[67] On the difficulties of ensuring local implementation of central dictates, see Mertha and Zeng 2005. Another analyst of the Chinese legal system notes that "[f]or many issues, there is simply no single institution that has the authority, the power, and the desire to have the last word. As a result, what appears at times to be a kind of anarchy in the system, where government agencies do not follow the law, is perhaps better explained as a kind of *hyperarchy*, where there are too many legal authorities, each empowered to make law for as far as it has the power to stretch its jurisdiction, and there exists no institution capable of discovering and reducing inconsistencies" (Clarke 2005: 71)

[68] e.g., PRC State Council Information Office 2008, 2011

[69] The CCP newspaper, People's Daily, hosts a webpage devoted to explaining this campaign: "The Four Comprehensives: The Strategic Layout Leading the Way to the People's Rejuvenation," http://politics.people.com.cn/GB/8198/394083/

identified in the "Decision" issued by the CCP Central Committee emerging from the long work conference on the subject was a redoubled commitment to improve China's instrumental use of international law to advance political aims:

> Strengthen foreign-related legal work. Adapt to the incessant deepening of opening up to the outside world, perfect foreign-oriented legal and regulatory systems, stimulate the construction of new structures for an open economy. Vigorously participate in the formulation of international norms, promote the handling of foreign-related economic and social affairs according to the law, strengthen our country's discourse power and influence in international legal affairs, use legal methods to safeguard our country's sovereignty, security and development interests.[70]

Even if their legitimacy is in doubt, there is significant political support for participating in international legal regimes and *influencing* the norms composing them. This effort requires, among other things, a strengthening of China's own internal "legal work." Still, formal legal requirements associated with incorporating ratified international treaty commitments into international law are indeterminate, and afford considerable discretion to political elites within the Party and state administrative agencies regarding how to adopt legislation and regulation. Necessary legislative and regulatory steps cannot occur without elites judging them to be a high political priority. China's maritime disputes are evidently such a priority.

III. Mobilizing for maritime disputes: expanding rights and transforming interests

Maritime disputes easily meet the threshold of political importance that appears necessary for transnational legal processes relating to the law of the sea to reach deep into the Chinese state. These disputes touch on sovereign integrity, resonating with the strong nationalist narrative of a "century of humiliation" at the hands of malign Western and Japanese forces. There are

[70] "CCP Central Committee Decision concerning Some Major Questions in Comprehensively Moving Governing the Country According to the law Forward" (23 October 2014), translated at: https://chinacopyrightandmedia.wordpress.com/2014/10/28/ccp-central-committee-decision-concerning-some-major-questions-in-comprehensively-moving-governing-the-country-according-to-the-law-forward/

considerable economic resources at stake, particularly oil and gas, as are the fortunes of other maritime industries like shipping, fishing, and tourism. The disputes surface increasingly divisive issues in diplomacy with all of China's maritime neighbors, and serve as a major point of geopolitical friction with the region's dominant military power, the United States. By any account, these disputes generate the political urgency necessary for party-state elites to initiate meaningful internalization and implementation processes. They are at the very top of the present leadership's political agenda, and have been cited by authoritative voices as among China's "core interests," elevating their political salience to an extraordinary level sufficient to make any laws and regulations touching upon them significant. Meanwhile, the qualities of original EEZ norms – i.e., largely constitutive, indeterminate, creating an entirely new domain for state activity – reduce obstacles to implantation because of a relative absence of entrenched bureaucratic impediments.[71] High-level political prioritization of maritime issues, coupled with a set of legal norms that are susceptible to reconfiguration by the Chinese political-legal system create favorable conditions for transformative internalization and implementation processes.

Defining and protecting maritime rights and interests

PRC legal institutions cannot independently internalize or implement international law. They do so as only a function of political decisions that particular aspects of that law are useful for political ends; these processes effectively transform law into policy and practice where those political ends are of sufficiently high salience. The established method for communicating that salience in a one-party Leninist system is sloganeering. The CCP signals its priorities through

[71] "The most drastic changes may also be seen in those sectors with little established institutional structure such as distribution or insurance, because of the absence of co-ordinated bureaucratic obstruction" (Mertha and Zeng 2005: 321).

repetition of rhetorical tropes that convey very little of substance of the goal itself, but indicate to lower levels of the party-state that the named goal is important and demands further elaboration in law and practice.

Since at least the landmark 1992 PRC Law on the Territorial Sea and the Contiguous Zone (Territorial Sea Law),[72] the concept of "maritime rights and interests" has become such a vehicle. That formulation connects the legal concept of "rights" (权利) to the political concept of "interests" (利益), joining them in a compound word that neatly expresses their inextricable connection in China's political-legal system. It serves as a convenient and powerful mode of official communication about the imperative to use the law as an instrument to achieve political goals.[73] China's specific maritime rights and interests remain undefined, but stand in as the rhetorical embodiment of nearly every PRC political, economic and strategic goal associated with the maritime domain. Planning documents, white papers, newspaper editorials and scholarly works also embark from the assumption that various rights and interests are under threat and must be defended, nearly always following the approved formulation: China needs to defend (or safeguard) its maritime rights and interests (维护海洋权益) from foreign threats. [74]

The public political salience of maritime rights and interests corresponds with the internal discussion of ratification of the UNCLOS III treaty.[75] Throughout the 1980s, domestic

[72] Article 1 of the Territorial Sea Law states: "This law is formulated in order to enable the People's Republic of China (PRC) to exercise its sovereignty over its territorial sea and its rights to exercise control over its contiguous zone, and to safeguard State security as well as its maritime rights and interests."
[73] This construction is common in party-state documents, appearing in the 1982 Constitution 11 times in both general and specific form (though not referring to those rights and interests in the maritime domain in that document).
[74] Beginning in 1984, Chinese law and politics journals have published some 2960 articles with "maritime rights and interests" as a keyword (CNKI China Academic Journals, author search, 3 February 2015). Some 2,236 articles in that database use the construction "defend maritime rights and interests" (维护海洋权益) (author search 22 July 2016).
[75] Author discussion with MFA official in Department of Marine and Boundary Affairs (Hainan, December 2014).

consideration of the treaty was muted, and legal internalization was a low priority in light of far more urgent development demands accompanying the PRC's ambitious reform and opening program. Until the early 1990s, there was little probability of achieving the 60 ratifications required for the treaty to enter force (as stipulated in UNCLOS III, Article 308) due largely to opposition of the U.S. and other major maritime powers to the deep seabed mining provisions of Part XI. An implementing agreement for that part resolved this impasse in 1994,[76] by which time sufficient ratifications were achieved for the treaty to go into effect in November 1994.

Chinese officials began to prepare the bureaucracy for ratification in the early 1990s.[77] A State Council-led National Ocean Working Conference was held in Beijing in January 1991, producing an (internal) report on China's Ocean Policy and Working Outlines, a precursor to the 1992 Territorial Sea Law.[78] Whereas prior state and party discussion focused primarily on development of marine industries, the impending entry into force of the treaty renewed interest in the various disadvantages the treaty posed for China, not least the potential for the new EEZ to further complicate long-standing maritime disputes.[79] In order for the ratification of the treaty to pass political muster, officials working on maritime law and policy needed to reconcile the purpose of the law of the sea and the function of its various norms to the state's broader political priorities. The possibility that other states' claims in maritime disputes would improve as a result of their accession to the treaty was among the risk factors that prompted China's decision.[80]

[76] "Agreement Relating to the Implementation of Part XI of the Convention," http://www.un.org/depts/los/convention_agreements/texts/unclos/closindxAgree.htm
[77] Peter Dutton suggests that among motivations for ratifying the treaty at this stage was not just the global trend towards doing so, but China's desire to improve its chances for entry into the WTO by demonstrating that it was capable of constructive participation in international legal institutions (discussion with author June 2016).
[78] Li 1998: 303
[79] Author interview with member of Hainan Foreign Affairs Office, June 2014. See also discussion in Chapter 2, and Zou 2005: 338-345.
[80] Author discussion with MFA official (Beijing, December 2014); a similar point was made by the professor in a Tsinghua Law School class audited by the author (Beijing, December 2014).

According to a PRC official, "[a]fter UNCLOS was made public, each country began the process of drawing boundaries for territorial seas, contiguous zones, and EEZS. Each country sought out UNCLOS articles that benefitted its cause."[81] As a matter of political expedience, if not legal obligation, China was motivated to parallel the internalization efforts of other states whose claims would inevitably challenge its own.

Over the course of the 1990s, a series of political documents defining the various legislative, administrative, and law enforcement tasks on the horizon appeared in the Chinese public sphere. Prominent among them was China's "Oceans Agenda 21" (中国海洋 21 世纪议程)[82] a widely-referenced planning document produced by the NPC in 1996. Drafted by the leading State Council agency with maritime responsibilities, the State Oceanic Administration (SOA), it identified the Convention with an expansion in the scope of China's maritime rights and interests: "UNCLOS has brought opportunities for the development and exploitation of the oceans over a wider area." The Agenda further noted that UNCLOS provided a legitimate basis for establishing state authority over this broad area, having "established a formal international legal basis for comprehensive management of the oceans, defense of maritime rights, and protection of maritime environment and resources…[in an area of] approximately 3 million km^2 of waters."[83] The agenda laid out the principle internalization and implementation goals for the state as it prepared to ratify the Convention later that year.[84] The agenda mentions "maritime

[81] Xu 2012: 1, quoting Wang Shuguang, former head of the State Oceanic Administration.
[82] PRC State Oceanic Administration 1996
[83] *Ibid.*, Ch. 10 and preamble.
[84] The principle tasks, as paraphrased in Zou 2012: 148, are (1) establishment and development of ocean industries by following the principle of sustainable development; (2) promotion of ocean development activities by incorporating social and economic development of coastal areas; (3) promotion of sustainable development of coastal islands; (4) conservation of marine living resources; (5) promotion of science and technology for sustainable development; (6) establishment of an integrated ocean management system; (7) protection of the marine environment; (8) strengthening ocean observation, alert, and disaster reduction; (9) enhancing international cooperation; and (10) promotion of public participation.

rights and interests" eight times, in five instances accompanied by the imperative that the state take deliberate action to "defend" them. Among the means available to do so, the agenda prescribes legislation and implementation measures that would enable management, use and protection of marine resources.[85]

This document also highlights the need to "perfect" (完善) the PRC's still-incomplete maritime legal scheme and coordinate its unruly maritime bureaucracy. Recognizing that the small number of existing laws and regulations pertained mostly to narrow, administrative areas (like oil and gas leasing, and fisheries permits), the agenda urged broader legislation and regulation to achieve comprehensive management (综合管理). It further laments that much of China's maritime law in 1996 was simply an extension of existing terrestrial law, and thus did not create norms and political priorities distinct to the maritime domain, leaving this task largely up to administrative agencies like the SOA.[86] The consensus among political elites codified in this document was that extant legal rules governing maritime issues failed to take into account China's political interests "in the ocean as a whole."[87]

As the treaty came into effect and crystallized other states' competing claims to resource rights and jurisdiction, Chinese leaders recognized a political imperative to better define and enforce

[85] PRC State Oceanic Administration 1996: Article 7.6

[86] Pursuant to the 1990 Legislation Law, the SOA adopted the Regulations on the Procedure to Make Ocean Regulations in November 2007. The SOA is assigned broad discretion in overseeing maritime-related regulations, including authority over: (1) drafts of laws entrusted by the legislature; (2) administrative regulations subject to the approval of the State Council; and (3) department regulations subject to the approval of the Ministry of Land and Resources (Article 2). The legal department of the SOA is responsible for organizing and preparing drafts on ocean lawmaking projects, organizing and preparing the lawmaking plan and monitoring its implementation, organizing the review of lawmaking projects, guiding local ocean lawmaking, and organizing the work for ocean law interpretation, revision and compilation (Article 5). For the purpose of lawmaking, the SOA establishes the Law-Making Group led by a chief administrator of the SOA and also an Ocean Law Expert Committee which provides advice and review opinions.

[87] PRC State Oceanic Administration 1996: Article 7.8; Author interview with SOA official, September 2014.

China's claims. This imperative remains salient today, as the "perfection" of various states' maritime claims and their legal underpinnings has been a slow and iterative process throughout the globe.[88] Practical enforcement of claims, especially disputed ones that are not under the state's effective control, requires constant attention and steady resource inputs; it is thus an ongoing process in China, as it is elsewhere. UNCLOS-based domestic maritime laws defining claims and assigning responsibilities to state actors and regulating maritime industries are the global norm, and in this respect, China's push to internalize the law of the sea is not distinctive. The extent to which the original norms are transformed in their transit through Chinese political-legal institutions, however, is distinctive in the level of discretion in this process exercised by political elites.

One prominent law of the sea scholar at the premier state think tank, the Chinese Academy of Social Sciences, captures the role that political elites intend domestic law to play in light of a perceived competitive dynamic to claim rights and jurisdiction: "In order to protect maritime rights and interests, we must have national mechanisms that are organized according to the law – specifically, domestic law…In designing and implementing a perfect legal system for the oceans, UNCLOS will play a fundamental role."[89] UNCLOS furnishes the raw materials, in the form of internationally legitimized norms, for a broader policy apparatus whose motive force is defense of maritime rights and interests; as the policy demands for their proper defense change, so too does the domestic use of the maritime law.

From Propaganda to Practical Planning: The State Seizes Maritime Responsibilities

[88] Schofield (ed.) 2014 is an especially helpful volume on the present state of global maritime claims. As noted, a majority of maritime boundaries remain undelimited, largely as a consequence of overlapping claims to jurisdiction.
[89] Liu 2013: 1

With the treaty ratified and the broad national political agenda set, the broad discretion of administrative agencies to use law towards policy ends came to the fore. In 1998, the State Council released its own authoritative political statement on the maritime-related political and legal tasks facing the PRC, in the form of a White Paper on "The Development of China's Marine Programs."[90] It builds on the Agenda, noting that "the basic ideas of the strategy [in Oceans Agenda 21] are as follows: "to effectively safeguard the state's maritime rights and interests, rationally develop and utilize marine resources, give positive protection to the marine eco-environment and realize the sustainable utilization of marine resources and the marine environment as well as the coordinated development of the work in this field."[91] This document is, in effect, the state's highest executive and administrative organ speaking to itself about its basic policy goals, and acknowledging that it is not yet properly adapted to the functional tasks prescribed in the new law of the sea regime. Although the internalization process was nascent at this stage, the White Paper nonetheless takes note of substantial progress in bringing Chinese domestic law into line with UNCLOS III to date, observing that "[i]n content, these laws and administrative regulations are all consistent with the principles and relevant provisions contained in the UN Convention on the Law of the Sea. The formulation and implementation of these laws, rules, and regulations has, on the one hand, protected China's state sovereignty and marine rights and interests, and on the other, promoted the rational development of marine resources and effective protection of the marine environment. Comprehensive management of China's marine areas is beginning to be contained within a legal framework."[92]

By 2001, the ascendant "maritime rights and interests" construct made its way into the text of the

[90] PRC State Council Information Office 1998
[91] *Ibid.*, Section I. Sustainable Marine Development Strategy
[92] *Ibid.*, Section V. The Implementation of Comprehensive Marine Management

NPC's Tenth Five Year Plan (5YP). There is no stronger political endorsement for state agencies to prioritize tasks than an imprimatur in this most authoritative planning document for economic development. In it, a new section on protecting China's land and water resources devolves authority to the State Council and its various agencies to "strengthen use and management of maritime areas and defend maritime rights and interests."[93] The rights-and-interests concept had already been enshrined by top leadership and codified in the Territorial Sea Law as well as hundreds of pieces of implementing regulation and other normative documents at local levels; its elevation into an article of central economic planning is strong evidence of its political ascendancy. Linking disputes to the urgent demands of economic development, generally considered the party's first policy priority, sends a signal to act that could be readily interpreted by the various, peripheral actors involved in drafting and implementing legislation. By this stage, the challenges posed by the UNCLOS treaty for China's maritime disputes were recognized – indeed, it was already in diplomatic negotiations with the Association of Southeast Asian Nations (ASEAN) to develop a Code of Conduct for Parties in the South China Sea to check growing frictions over sovereignty and usage rights in that semi-enclosed waterway.[94] Consolidating gains in effective administration and heading off mounting diplomatic and operational opposition to China's creeping control over the space were widely accepted political objectives by this stage, and have only become more so over time.

Subsequent 5YPs have devoted ever-increasing space to the priority of defending maritime rights and interests in the context of growing tensions over these disputes. In the 11th 5YP (2006), China's leading economic planners announced the imperative to develop resources in the EEZ

[93] PRC National People's Congress 2001
[94] This initiative followed China's 1994 seizure and 1995 infrastructure-building on the unoccupied and aptly named Mischief Reef (美济礁), also claimed by the Philippines and Vietnam (Fravel 2008: 296-298).

lest they be developed by other states.[95] Beginning in 2011 with the 12th 5YP, these maritime imperatives were reiterated and expanded, then elaborated in far more specific form in an entirely separate report, the "12th Five Year Plan for Marine Development,"[96] issued by SOA. Laying out principally economic goals for the agency, this agency planning document devotes an entire chapter (16) to "Maritime Laws and Regulations." A section in that chapter identifies the priority of "Strengthening Marine Legislative Work" and emphasizes the need to "build a sound legal and regulatory system that enables coordination between the top and bottom." Officials are encouraged to "promote the popularization and propaganda of those maritime laws and regulations." This 5YP makes abundantly clear the connection between, on the one hand, the political demands of maritime disputes and marine economic development, and on the other, the need for an effective domestic legal scheme to bolster those efforts.

The CCP's promotion of maritime rights and interests to the utmost political priority reached a crescendo alongside those 2012 5YPs. Then-President Hu Jintao's work report to the CCP's 18th Party Congress declared China's ambition to become a "strong maritime power" (海洋强国), and to that end announced imperatives to "enhance our capacity for exploiting marine resources, develop the maritime economy, protect the marine ecological environment, and resolutely safeguard China's maritime rights and interests."[97] His successor, Xi Jinping, took office that year and immediately complemented Hu's pronouncement with a continuing series of statements and foreign policies that further elevate the salience of China's "maritime rights and interests" in

[95] PRC National People's Congress 2006
[96] PRC State Oceanic Administration 2011; see Martinson 2016b for detailed discussion of the sequence of 5-year plans and their relationship to maritime policy.
[97] Xinhua 2012

realizing the goal of becoming a strong maritime power.[98] State officials, especially those from the principal maritime agency, the SOA, have followed suit, noting that "[t]he most important prerequisite for the building of a maritime power is to…protect the nation's maritime rights and interests from being violated. If our nations core maritime interests and the basic maritime rights and interests cannot be effectively protected, there is no way to talk about building a maritime power."[99] These statements mark a further amplification of authoritative commands to use domestic maritime law to promote maritime rights and interests and the maritime power goal.

The new administration is not leaving the "perfection" of PRC maritime law solely to the discretion of the apparatchiks running their respective agencies. Beginning 2012, Xi organized representatives from the SOA as well as those from the Ministry of Public Security, Ministry of Agriculture, and leading CCP Politburo members into a "Central Leading Small Group on the Defense of Maritime Interests."[100] Such "leading small groups" (领导小组) indicate the highest possible political priority for a given issue, positioning the small group in a meta-bureaucratic rank that confers supreme decision-making status to the body. The efficacy of that decision-making depends upon the existence and coordination of a large state administrative and law enforcement apparatus that had been developed over the prior two decades of internalization and implementation of the law of the sea.

The prior survey cites various state and party pronouncements establishing the overwhelming political importance of maritime rights and interests as they pertain to maritime disputes.

[98] See, for example, Xi's extensive remarks on maritime power and maritime rights and interests at the 30 July 2013 Eighth Group Study Session of the Political Bureau of the CCP Central Committee on the Development of Maritime Power (Xi 2013).
[99] Liu Kefu 2013: 1; see McDevitt (ed.) 2016 for a thorough sector-by-sector analysis of the "maritime power" project.
[100] People's Digest 2013

Because the political-legal system lacks fixed procedures for incorporating international law, such communication is necessary for any meaningful internalization and implementation process to proceed. Notably, none of these documents and statements offer any precise account of the scope or content of the rights and interests to be defended – such determination is left to the discretion of the leadership of the party and relevant state organs, allowing for adjustments in light of policy priorities.

Conclusion and transition

The prior analysis of the black letters of Chinese law establishes that no formal process is in place that obliges treaty norms to become a part of PRC legislation or regulation. Instead, the determination of how, when and whether such norms are internalized and implemented lies with political elites – especially in the central CCP leadership – who turn indeterminate domestic rules into actionable commands for lower levels in the bureaucracy. The campaign to promote "ruling the country by law" indicates that law has become a preferred mechanism for transmitting such commands from the head to the hands and feet of the sprawling party-state apparatus. The associated legal reforms do not in themselves ensure that a particular treaty will be incorporated into domestic institutions, but creates a norm through which such a process can proceed. The necessary and sufficient condition for meaningful application of treaty norms is a central decision that a particular political issue warrants their internalization and implementation. China's maritime rights and interests surrounding their many maritime disputes easily meet this threshold. The subsequent Chapter thus picks up from this starting point, exploring the specific pathways and processes through which UNCLOS III – and the EEZ in particular – finds its way into the Chinese state.

Chapter 5

Internalizing and Implementing the Law of the Sea: The Making of China's "Blue Territory"

> "[P]eace-loving countries will definitely use UNCLOS as a weapon to defeat maritime power politics."[1]
>
> - PRC State Ocean Administration Director, Wang Shuguang

> "[A]ccording to UNCLOS and our country's claims, we possess around three million square kilometers of waters under administration. Of course, there is a significant area that is in dispute, which is to say, there is a long way to go and much difficult work to be done to genuinely roll out our maritime undertakings over three million square kilometers of blue territory."[2]
>
> - PRC Minister of Land and Resources, Zhou Yongkang

When the PRC signed UNCLOS III in December 1982, the state had almost no domestic maritime law, virtually no capacity for administering waters beyond port areas, and only rudimentary claims delimiting territorial seas.[3] By the time of its accession to the treaty in June 1996, the PRC had an embryonic maritime legal scheme consisting of broad, indeterminate public claims backed up a small handful of domestic statutes and regulations. These early legal instruments sketched the broad contours of a maritime apparatus that has continued to develop over the ensuing twenty years, steadily elaborating and institutionalizing claims to rights and jurisdiction that outstrip the provisions of UNCLOS III in several important respects.

[1] PRC State Oceanic Administration 2002: 40
[2] PRC State Oceanic Administration 1999: 10-11
[3] The principle formal act of state practice was the 1958 PRC Declaration on the Territorial Sea (discussed in

[2] PRC State Oceanic Administration 1999: 10-11
[3] The principle formal act of state practice was the 1958 PRC Declaration on the Territorial Sea (discussed in Chapter 3, Section III), which claims a 12 nautical mile territorial sea around all of China's mainland territory as well as around disputed islands in the South and East China Seas.

The development of this maritime legal scheme may be reckoned as processes of internalizing law of the sea norms into PRC legal institutions, and implementing them with creeping administrative and law enforcement practices. In so doing, China has utilized international norms to claim broader and deeper resource rights and jurisdictional competencies than those permitted by the 320 articles and 9 annexes of UNCLOS. Due to limited effectiveness legal institutions in the Chinese political-legal system, the meaning and consequences of internalizing and implementing UNCLOS are obscure without inquiry into the specific functional areas covered in domestic law and how they are dealt with in practice, the substantive focus of this Chapter.

Understanding China's instrumental use of international law demands inquiry into how that instrument is forged and wielded by domestic legal and political institutions and actors. China's political-legal system enables processes of internalization and implementation that promote the state's exercise of steadily creeping jurisdiction in its claimed maritime zones – especially the EEZ. UNCLOS-derived norms for the EEZ provide a scaffolding upon which the PRC has constructed domestic law and regulation that, on balance, expand the scope and augment the content of claimed rights and jurisdiction. That new legal regime expanded the maritime space under PRC jurisdiction from 37,000 km^2 to a claimed 3,000,000 km^2 – yet not one of the PRC's potential EEZ boundaries is delimited in PRC law.[4] Each boundary (and the EEZ it delimits) is the object of a dispute with one of its nine maritime neighbors (Japan, North Korea, South Korea, Taiwan, the Philippines, Malaysia, Brunei, Indonesia, and Vietnam). A host of diplomatic, economic, and strategic challenges arising from these disputes furnish the political urgency required for the Chinese party-state to internalize and implement a distinct version of

[4] There is no precise, official claim that specifies the boundaries of this "3,000,000 km^2" purportedly under China's jurisdiction, but it is the figure used in all official and unofficial Chinese commentary on the question as a way to emphasize the large volume of "blue territory" that China owns but does not administer. The authoritative Academy of Military Sciences describes half of this area as "already controlled by other nations" (Ge 2006: 223).

EEZ norms that best support and extend PRC claims. These norms are the foundation of a broad political effort to build administrative and law enforcement capacity to "expand" and "defend" China's maritime legal rights as an auxiliary support for its growing maritime interests.

Laws to Create, Expand, and Defend China's "Maritime Rights and Interests"

The PRC's legal institutions are not designed to directly internalize norms from international treaties. They are a means of coordinating the party's political goals with the state's practical actions, and use international legal norms instrumentally toward that end. Political discretion penetrates every level of the indeterminate legal hierarchy and ensures that party-state elites are in a position to determine whether and how *any* domestic legal rule is established. The purpose of enacting such rules in the case of law of the sea norms is not to constrain the state, but rather to enable more effective instrumental use of international law. The prior Chapter established that maritime rights and interests related to China's maritime disputes have reached a threshold of political urgency such that meaningful internalization and implementation processes can proceed. This Chapter addresses how the politics of China's maritime disputes shape these processes, on balance enabling – rather than constraining – Chinese elites, who use maritime law as an instrument to press maritime claims and mobilize domestic resources that augment the content and expand the scope of China's claimed EEZ rights. This amounts to "creeping jurisdiction," in which China enforces domestic laws that exploit indeterminate norms prescribed in UNCLOS to effectively supplant international law with PRC law in disputed zones.

There are major differences between merely putting rules that contravene international law on the books and putting them into practice. Only in recent years has the PRC's maritime legal scheme reached a level of development and sophistication – including major investments of

resources, personnel, and considerable organizational reform – that its implementation makes a splash. Now, with growing capacity to enforce a multiplying collection of domestic laws, regulations and rules governing EEZ resources and activities, Chinese actors can take progressively bolder steps to practically implement domestic maritime laws. That implementation is especially problematic within the roughly 1,500,000 km^2 of maritime space under dispute with its neighbors. In these "grey zones" of contested sovereign authority, PRC law is in direct conflict with other states' domestic maritime law. The problems this generates are increasingly of the operational sort: PRC domestic law generates new and expanded functional roles for maritime law enforcement and administrative agencies, which use that law as an instrument to assert Chinese rights and jurisdiction exceeding prescribed limits under UNCLOS and customary law of the sea.

This Chapter analyzes not just the transformation of international norms, but how those norms enable the transformation of the state. The scope, content and function of state organs transform to take on these new and expansive roles. The process can be assessed in terms of the *internalization* of the new EEZ regime into domestic institutions and its *implementation* as policy and practice. These processes depart from the theoretical expectation that repeated transnational legal processes surrounding the law of the sea will ultimately produce obedience, as their empirical analysis demonstrates a pronounced decoupling from the original content and scope of the norms in UNCLOS III. Especially visible in the case of the EEZ, these UNCLOS-based norms are repurposed and transformed in the course of becoming part of China's domestic institutions. Reciprocally, in adopting these modified norms, the functions and capacity of the Chinese state change dramatically to reflect new and expanded interests transformed by China's encounter with the law of the sea. By organizing the inquiry along the lines of the specific

jurisdiction and defined resource rights prescribed in black letters of the EEZ regime laid out in UNCLOS III, we can observe the various ways in which the state maritime apparatus has "grown into" the EEZ.

Part I demonstrates how China's national legislation, administrative regulation and departmental rules[5] expand the *scope* of PRC maritime jurisdiction and resource rights. Part II connects these internalized laws to the new *functions* required for their practical implementation in China's claimed zones. It tracks how this expanded authority transforms the state, creating new functional roles for its various agencies. Of the various ways in which the state maritime apparatus has "grown into" the EEZ, its maritime law enforcement agencies are the most prominent beneficiaries of new responsibilities and resources to perform these new functions. Part III analyzes how the PRC has internalized and implemented specific resource rights and jurisdictional competencies assigned under UNCLOS in such a way as to expand their substantive *content*. It demonstrates how broader and deeper claims to maritime rights and jurisdiction create demands within the state for new capacity, effectively enabling greater control over the EEZ (i.e, creeping jurisdiction towards the end of closure). A concluding section examines how China's practices can potentially feed back into the international norms underpinning the law of the sea, a phenomenon that will ultimately depend on how other states respond to PRC implementation of its growing body of domestic maritime law.

[5] Unlike in many Western states, there is no meaningful transparency or publication requirement for state organs when they issue laws, regulations, or rules. They are sometimes publicized, and the banner legislation is compiled in yearbooks, but there is no searchable database or centralized collection of all the relevant laws and regulations. The author's selection of legal instruments is based on the National People's Congress Legislative Work Commission's 2014 中华人民共和国啊现行法律行政法规汇编 [The Effective Laws and Administrative Regulations of the People's Republic of China] and the PRC State Oceanic Administration, Department of Policy Legislation and Planning's 2012 中华人民共和国海洋法规选编 [Collection of the Sea Laws of the People's Republic China]. Where these sources are not comprehensive, I rely on other SOA publications (especially the annual Oceans Yearbooks and Ocean Development Reports), and supplementary interviews with Chinese law professors, maritime law and policy specialists, and state maritime officials over the course of 2014-2015.

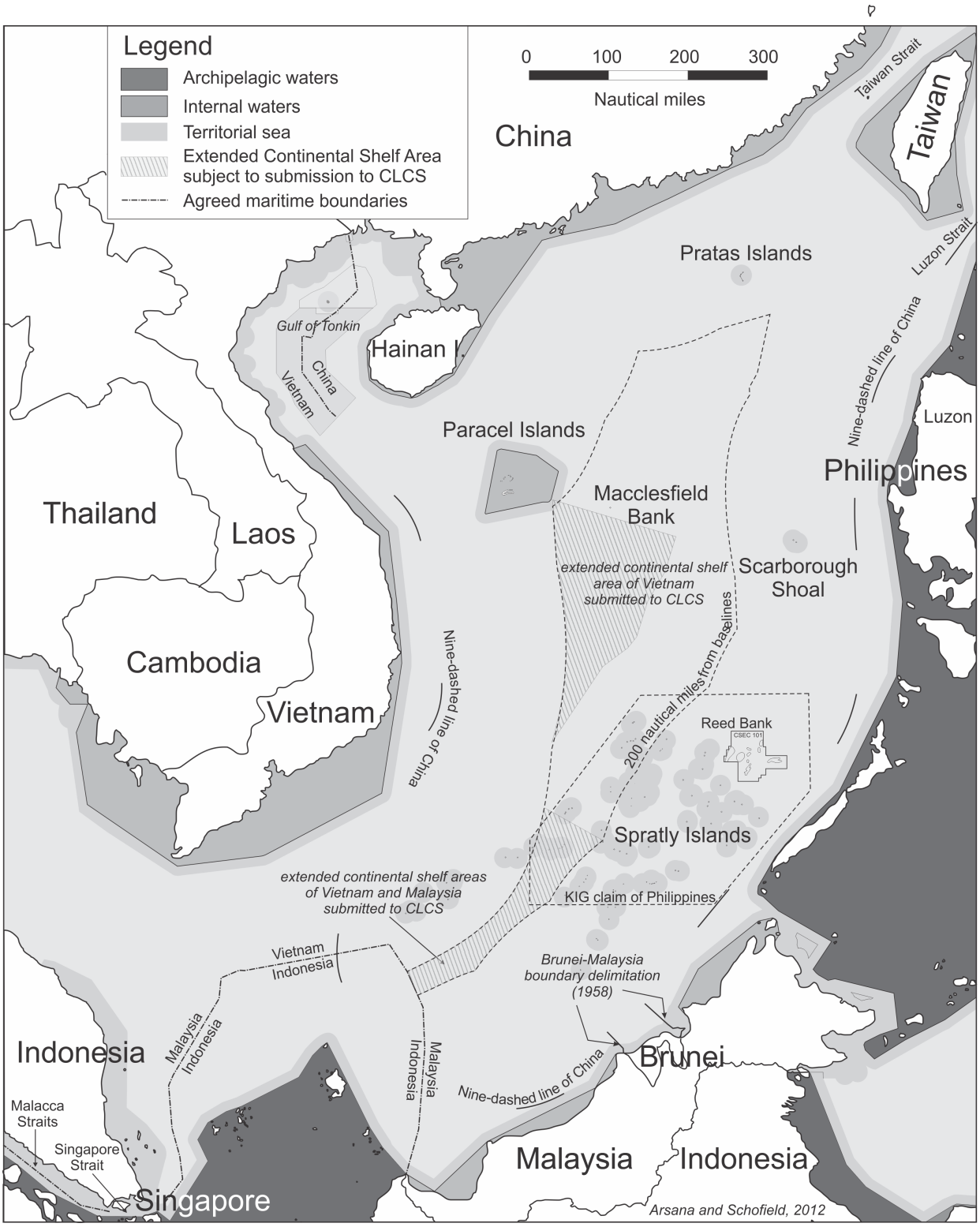
I. Expanding the scope of PRC maritime rights and jurisdiction

In internalizing and implementing its domestic laws and regulations, the PRC stakes claims to rights and jurisdiction that exceed those permitted under UNCLOS, in some cases substantially. The following section focuses on geographic scope of the PRC's claimed rights and jurisdiction, taking stock of the transformation of various EEZ norms as they are internalized and applied. To do so, it analyzes Chinese legislation and regulations in light of the norms established UNCLOS III Part V (Articles 55-75),[6] as well as other parts of the Convention that touch upon coastal state rights and jurisdiction in EEZs; where appropriate, departmental rules and other normative documents, official and scholarly comments, and interviews supplement the analysis.

As anticipated during the Conference, China's sovereignty disputes over islands in the South and East China Seas are directly implicated the question of the geographic limits of its EEZ. The degree to which these features influence the delimitation of EEZ boundaries remains a highly contentious question, and depends upon whether or not any of them can be considered a full-fledged island under Part VIII of the Convention. It establishes a "regime of islands," which states in Article 121(3) that "[r]ocks which cannot sustain human habitation or economic of their own shall have no exclusive economic zone or continental shelf." China expressly states that its claimed features are fully entitled to these jurisdictional zones and practices as though it holds, at a minimum, sovereign rights to resources and jurisdictional competence over activities in the zones *as if* it had EEZs extending from those disputed features. Maps 1 and 2 below indicate the location and jurisdictional scope of various provisional claims in the disputed SCS and ECS.

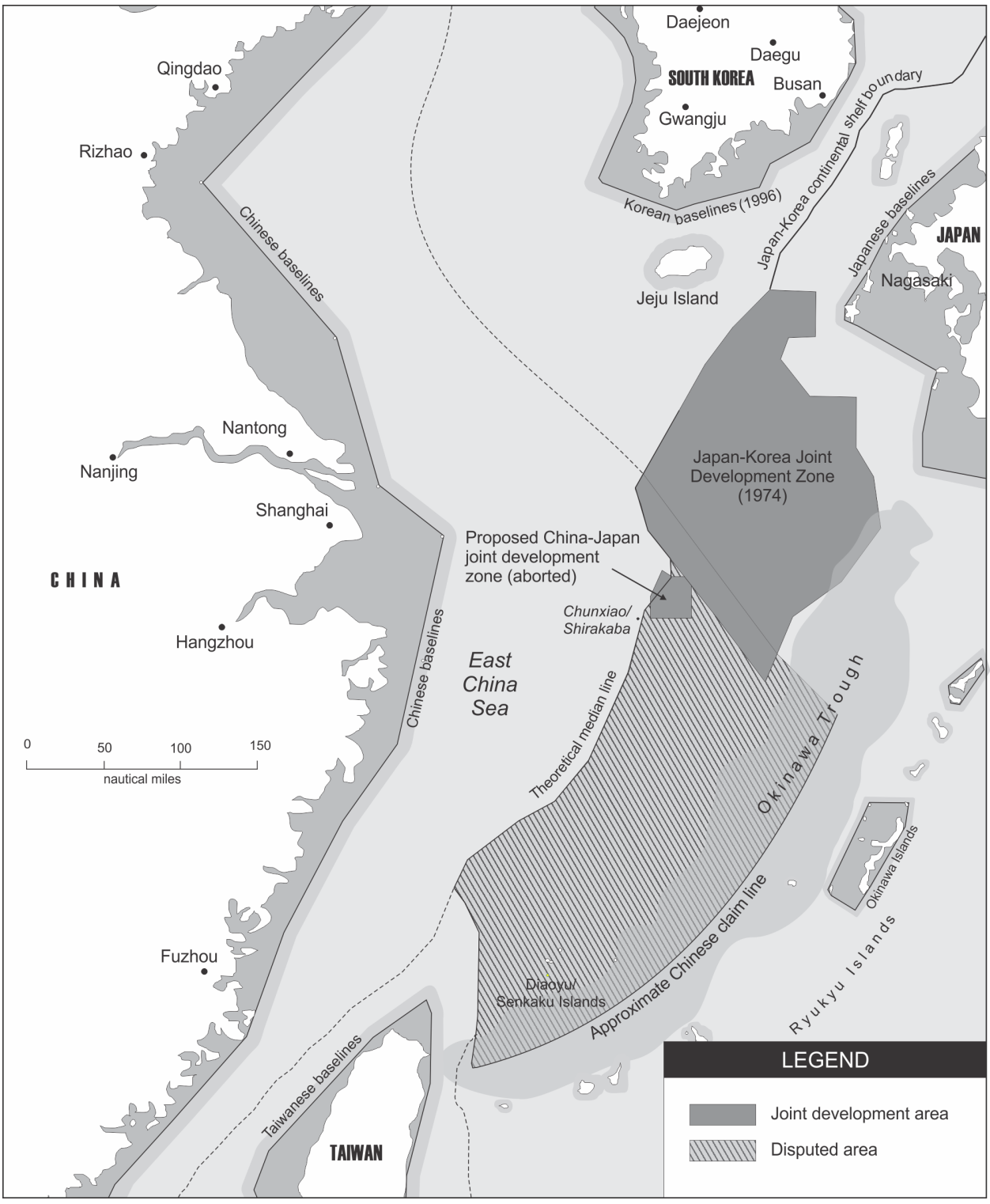
Map 1: South China Sea claims

[6] See Appendix A



(Source: Schofield and Arsana 2012)

Map 2: East China Sea claims



(Source: Schofield and Arsana 2012)

Stretching the Limits of EEZ Jurisdiction

The first and most fundamental characteristic of the Chinese domestic EEZ law and practice is its radical expansion of the limits of coastal state jurisdiction. It amounts to a wholesale redefinition of maritime space, transforming non-jurisdictional high seas to a zone under the jurisdiction of the coastal state. True to positions adopted prior to the start of the LOS Conference in 1973, China resists the application of a determinate rule on the geographic limits of that jurisdictional space.[7] Although China's delegates ultimately agreed to a 200nm limit and proclaimed that same limit upon ratification and in domestic legislation, the disadvantages of that rule were not lost on Chinese leadership. Consequently, many of disadvantages inherent to China from geographically-determined zone were not directly internalized.[8] Instead, PRC law alters that seemingly straightforward norm to suit its preferences. Because the Convention is unequivocal on the limits of EEZ jurisdiction, China relies on extra-UNCLOS concepts (like some brand of historically-generated rights) and loose or distorted interpretations of other UNCLOS norms (like straight and archipelagic baselines). Even more basically, no seaward limits of Chinese jurisdiction have been formally declared.

While it is indeterminate in PRC practice, the scope of EEZ jurisdiction is not among the indeterminate aspects of the regime as codified in UNCLOS. Article 55 defines the EEZ as "an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in this part" and fixes its outer limit at 200nm from the coastal baselines (Article 57). This is not an guaranteed entitlement, like that of the continental shelf which exists independently of the

[7] China's working paper in 1973 expressed this claim, as did its delegates to the Conference. See Chapter 2 and A/AC.138/SC.II/L.34, PRC 1973 Working Paper on Sea Area within the Limits of National Jurisdiction

[8] Chapter 2 discusses these disadvantages at length. The central issue is that China is surrounded by semi-enclosed seas and cannot, under any circumstance, reap the full 200nm entitlement due to the proximity of adjacent and opposite coastlines of neighboring states.

coastal state's claim.[9] An EEZ must be declared, delimited, and adjusted where it overlaps with the claims of other states. Where opposing or adjacent coastlines are within 400nm – as is the case for all of China's maritime boundaries – the Convention prescribes that "delimitation shall be effected by agreement on the basis of international law" (Article 74).[10] China has yet to reach any delimitation agreements for its EEZs, and has made no formal legal claim to the outer boundaries of its EEZs other than proclaiming upon ratification and in its 1998 Law on the Exclusive Economic Zone and Continental Shelf (EEZ Law) that it enjoys 200nm economic zones from all of its baselines, which have been drawn around all of China's claimed territory.

Excessive Straight and Archipelagic Baselines

Straight baselines. The expansion of the scope of PRC claims begins with its baselines, the origin of any delimitation effort. The PRC's declared baselines surround its mainland coast, as well as the disputed Paracel Islands in the SCS and the Diaoyu Islands in the ECS. To date, the PRC has not promulgated baselines around the disputed Spratly Islands in the SCS, but has indicated in a *Note Verbale* to the United Nations and various MFA statements that they collectively rate an EEZ and continental shelf.[11] The declaration that all of the PRC's land territory, disputed and otherwise, is surrounded by *straight* baselines and 200nm EEZs stakes out an "excessive" position for the limits of PRC jurisdiction.[12]

China's internalization of the EEZ regime's rules on delimitation begins with a systematic

[9] The ICJ ruled that "the rights of the coastal State in respect of the area of continental shelf…exist *ipso facto* and *ab initio* by virtue of its sovereignty over the land. In short, there is an…inherent right" (North Sea Continental Shelf Cases [Denmark/The Netherlands v. Germany] [1969] *ICJ Reports* 3, at para. 19).
[10] The article refers to the ICJ statute as the authoritative statement of sources of that law (*viz.,* treaties, custom, general principles of law; secondarily, "judicial decisions and the teachings of the most highly qualified publicists."
[11] See PRC Permanent Mission to the United Nations 2011; China's baselines around the Paracels were lodged with the UN in 1996 (PRC Ministry of Foreign Affairs 1996); it lodged claims to baselines around the Diaoyu Islands in 2012 (PRC Ministry of Foreign Affairs 2012).
[12] US Department of State 1996; Roach 2013

expansion of the scope of PRC jurisdictional waters in the form of its default to "straight baselines" from which all zones are measured. Indeed, China's 1992 Territorial Sea Law as well as 1996 and 2012 Declarations on the baselines around the Paracel and Diaoyu islands, respectively, delimit straight lines connecting basepoints that maximize the scope of China's internal waters and push the boundaries of each UNCLOS zone further seaward. This decision is plainly at odds with the determinate text of the Convention, which prescribes a norm for baselines to follow the low-water line, and provides an exception for straight baselines only where "the coastline is deeply indented…or if there is a fringe of islands along the coast in its immediate vicinity" (UNCLOS III, Article 7). Although these special conditions obtain in certain areas along the mainland coast, Chinese law makes straight baselines its *only* mode of drawing baselines. PRC legislation baldly rejects the agreed international norm for baselines.

Archipelagic baselines. Furthermore, China's straight baselines around disputed territories are drawn around *groups* of islands, rather than around individual features. Describing the Paracels, Diaoyu, and Spratly Islands as "archipelagos" or "groups" or as somehow constituting "a geographic unity," PRC officials and publicists claim that straight baselines are the appropriate practice, and delimit jurisdictional zones accordingly. In doing so, PRC law again systematically departs from the clear black letters of the treaty, which allow this special archipelagic baseline regime *only* in the case of states "constituted wholly by one or more archipelagos" (UNCLOS III, Article 46). China refers to each of its disputed island groups as archipelagos that themselves, by implication, warrant status as "archipelagic states." In the case of the Diaoyus and Paracels, the PRC government has drawn archipelagic baselines enclosing them.

China's decision to enclose island groups contravenes the Convention's definition of

archipelagic states, and even exceeds the determinate norm established for how much water space may be enclosed by an archipelago. Article 48 establishes clear maximum of water to land area enclosed in archipelagic baselines at 9 to 1, which ensures that archipelagic baselines do not encompass disproportionately large volumes of water space around very small terrestrial features. The ratio in the case of both island groups enclosed in PRC straight baselines (Diaoyu and Paracel) is three times greater than this unequivocal standard.[13] While there is no legal ambiguity on this count, Chinese law is clear and determinate in establishing such unlawful baselines; its diplomats and officials always characterize the disputed islands as forming "archipelagos" (群岛).[14] The political decision to enclose a larger volume of maritime space than UNCLOS permits has also been transmitted to the Chinese law of the sea community, who are currently working to retroactively discover a legal justification for this clear breach.[15]

This this move to enclose all of China's territorial claims by straight and archipelagic baselines demonstrates a deliberate and consistent commitment to expand the scope of PRC jurisdiction

[13] The ratio in the case of China's baselines around the Diaoyu Islands is 27.1:1 (Roach 2013); the ratio in the Paracels is 26.1:1 (Bureau of Oceans and International Environmental and Scientific Affairs 1996: 8).

[14] The key legal instruments defining China's baselines (the 1992 Territorial Sea Law, and 1996 and 2012 Declarations on baselines) refer to the Paracels, Spratlys and Diaoyus as "群岛," or archipelago/island group. The Spratlys have yet to be the subject of a formal baseline claim, though one was implied in the 2011 Note Verbale. This presumption of "archipelagic" status for the Spratlys is also standard in Chinese diplomatic rhetoric, e.g. Xinhua 2016 "外交部：中国将南沙群岛作为整体主张海洋权益 [Ministry of Foreign Affairs: China takes the Spratly Islands as a Whole in Claiming Maritime Rights and Interests]."

[15] In one vivid example, the author attended a conference at the East China University of Law and Politics in November 2014 in which an entire 90-minute panel and 30 minutes of Q&A were devoted to papers by law professors and think tank experts seeking to "construct a legal argument for China's archipelagic straight baselines," during which many unusual proposals were presented. Some suggested there were linguistic issues that could be exploited; others argued that "western methodologies were misleading" and others simply started from the premise that China's policy is *ipso facto* lawful and therefore must be the authoritative interpretation of the clear language of the Convention. Other Chinese scholars, writing in Taiwan and Singapore and familiar with the absurdity of the claim that China is an "archipelagic state" simply breeze past this problem, claiming that "UNCLOS leaves open the question of whether a continental state is entitled to draw straight baselines for its mid-ocean archipelagos" (Song and Zou 2012: 305) even while telling the author in discussions (Hainan, June 2014 and Taipei, January 2015) that there was no doubt that UNCLOS permitted archipelagic baselines only to archipelagic states. Rare Chinese scholars point to the possibility of disaggregating some of the features in the Spratlys for the purposes of drawing baselines and declaring zones (author discussions at workshops in Hainan, June and August 2014).

and rights by crafting domestic law that exploits real or perceived indeterminacy in the UNCLOS text.[16] In essence, PRC law assigns itself maritime rights and jurisdiction encompassing a larger geographic space than the law of the sea permits, beginning by reinterpreting the most basic and clear norms concerning delimitation. Although straight baselines and 200nm EEZs are allowed under certain conditions established under UNCLOS, they are not applicable given China's geography. In internalizing those norms, PRC law stakes out scope for its entitlements far broader than any reasonable reading of the black letters permits.

"Other sea areas under PRC jurisdiction"

The ostensible limits of PRC maritime jurisdiction, and thus the scope of their claimed rights, are further expanded in the enactment of a large volume of legislation and regulation tasking state agencies to administer and enforce laws within "other sea areas under PRC jurisdiction" (中华人民共和国管辖的其他海域). Reference to this undefined geographic space usually appears in PRC legislation, regulation, and rules as the last in a list of the UNCLOS-prescribed maritime zones – viz., the territorial sea, the contiguous zone, the EEZ and the continental shelf. In diplomatic discourse, PRC representatives refer to "adjacent" (附近) and "relevant" (有关) rather than "other sea areas," a similarly vague construction that does not refer explicitly to any UNCLOS-prescribed entitlement. Sometimes they refer to the UNCLOS zones as well as "other maritime rights and interests."[17] This vagueness is permitted by a domestic legal regime that

[16] In this case of baselines, that indeterminacy is entirely perceived because the text of the Convention is unequivocal. In other cases, explored below, the process is more complex and relies more on the discretion of actors at lower levels, who exploit indeterminacy to gradually expand PRC rights and jurisdiction.

[17] E.g., PRC Ministry of Foreign Affairs 2016a. The MFA spokesman states that "[f]rom historical, geographical, political, economic and legal points of view, the islands, reefs, cays, sands and the relevant waters of China's Nansha Islands are interrelated and have always been taken as a whole."

does not provide determinate accounting of Chinese maritime zones.

The undefined "other sea areas" formulation appears in some 69 legal instruments, among them 20 acts of national legislation, 22 administrative regulations, and 23 departmental rules.[18] Many of the major pieces of legislation that create new functional responsibilities for state agencies contain this language, which then reappears in lower-level implementing regulation, measures, and departmental rules intended to specify the practical duties of the relevant actors.[19] Due to the indeterminacy of this phrase and the complications it presents for the coordinated administration and enforcement of some basic tasks – namely, in determining where, exactly, PRC agencies are authorized to exercise jurisdiction – it has given rise to some observable confusion within the bureaucracy.

For example, in a 2003 review of the 1999 Special Maritime Procedure Law, the People's Supreme Court issued an interpretation of the term, in which it addressed the vague language at issue by begging the question of which waters are under Chinese jurisdiction: "The phrase 'the sea areas under jurisdiction' as prescribed in Item 3 of Article 7 of the Special Maritime Procedure Law refers to the contiguous zones, exclusive economic zones, continental shelves, *and other sea areas that are under the jurisdiction of the People's Republic of China*."[20] The court's reasoning indicates that legal clarity is inferior to the political demand facing the

[18] PKU Law database, search conducted Aug 2014 and verified in ChinaLawInfo search in June 2015

[19] Among prominent examples of national-level legislation and regulation including this problematic phrase are the Law on Fisheries, Law on Surveying and Mapping, Law on Marine Environmental Protection, the Law on Environmental Protection, the Special Maritime Procedure Law, the Regulations on Marine Scientific Research, Provisions on the Administration of the Protection and Utilization of Islands with No Residents, and in the Notice of the General Office of the State Council on Issuing the Provisions on the Main Functions, Internal Bodies an Staffing of the State Oceanic Administration.

[20] The Supreme People's Court Interpretations on the Application of the Special Maritime Procedure Law of the People's Republic of China, effective 1 February 2003 (Adopted at the 1259th meeting of the Adjudication Committee of the Supreme People's Court on December 3, 2002, No.3 Interpretation [2003] of the Supreme People's Court), italics added.

judiciary to maintain some degree of flexibility about the claimed scope of Chinese maritime entitlements. Certainly the court is not empowered to demand that the political leadership clarify the scope of PRC maritime jurisdiction, much less make that determination itself.[21]

This "other sea areas" construct does not appear in every document, an inconsistency that may be explained by the necessity for some degree of precision about the practical implementation of Chinese domestic law by maritime law enforcement agencies. In the State Council's 2007 Departmental Rules on Maritime Law Enforcement by Public Security Organs, the "armed police force and coast guards" are instructed to enforce law only within the UNCLOS-designated zones. In the same sentence, the document states that such MLE activities should be carried "in accordance with the relevant laws and administrative regulations and rules of this country," thus leaving open the possibility that an alternative domestic rule comprising broader, undefined areas of jurisdiction might be employed by MLE officials to justify activities beyond those normal zonal entitlements. This style of drafting also leaves open the possibility that mid-ocean features under dispute and lacking baselines and declared zones, such as those in the Spratlys, can still be subjected to PRC enforcement jurisdiction.

For example, the 2003 Provisions on the Administration of the Protection and Utilization of Islands with No Residents, jointly issued by the SOA, Ministry of Civil Affairs, and the General Staff of the People's Liberation Army (PLA), allows them to "strengthen the administration…protect the ecological environment…safeguard the maritime rights and interests of the state and national defense and security, and to promote rational utilization" (Article 1) of islands within China's interior waters, territorial sea, EEZ, continental shelf, and other sea areas under the jurisdiction of the PRC (Article 2). If an island is subject to China's jurisdiction, it

[21] Author interview with international law professor at PRC Law and Politics University (Beijing, March 2015)

must also be regarded as sovereign territory and would generate at least territorial seas (if not EEZ and continental shelf) in which the normal functions of the state would be authorized under UNCLOS. Because no such zones have been determined in the Spratlys, nor in the Diaoyu (administered by Japan), these administrative regulations instruct the implementing agency to submit to "examination and approval of applications" by the higher-level organ of the SOA "with consent from the General Staff Department," a central military body with broad decision-making authority for the PLA. In so doing, political discretion is retained at higher levels to narrow or broaden the scope, depending on circumstance, in which maritime law enforcement agencies practically operate to implement domestic law.

PRC internalization of norms governing the scope of its jurisdiction is not an impediment to implementation well beyond normal limits – nor even beyond those limits indicated in China's own domestic law. Of special note are the essentially geographic effects of broad baselines and the political flexibility afforded by undefined "other" jurisdictional zones. Below, closer examination of how various state agencies operate, especially those dealing with enforcement of domestic maritime law, will demonstrate how closure and creeping jurisdiction can be observed within the specific functions of the state within China's claimed jurisdictional zones.

II. Functional Transformation of the State: Expanding to Cover New Zones

Internalized PRC rules on the limits of its jurisdiction define a vast new space in which Chinese maritime rights and interests are in play. In implementing this maritime legal scheme, the PRC not only expanded the scope of its claimed authority, but created corresponding new and expanded functions for its administrative and maritime law enforcement (MLE) organs. Prior to the advent of the EEZ, these agencies had exercised no authority whatsoever beyond the

territorial sea. In response to this new zone of rights and jurisdiction, the party-state mobilized resources and built capacity to effectively control that space. The constitutive quality of EEZ norms ensured a basic lack of conflict among various stakeholders in China, both within the state and in the private sector. Where in other regimes, the state has had to manage distributional conflicts among winners and losers under new rules (e.g., trade), no such trade-offs are directly in play with respect to the EEZ. Economic interests in developing China's "blue" marine economy complement bureaucratic interests in seeking new responsibilities, resources, and rents on such activities; even the potentially constraining duty to protect and conserve fisheries and preserve the marine environment are sources of jobs and resources for the bureaucracy. Laws impose a negligible drag on barely-regulated marine industries, which have generally profited from access to greater geographic space and political support for marine economic development.[22]

Meanwhile, the foreign policy priority to prosecute China's maritime disputes creates conflicts with other states whose claims and access are challenged by China's push towards closure of disputed zones in the South and East China Seas. Protecting China's sovereignty from foreign invasion is a winning political formula for the party-state, which has coalesced around using maritime law instrumentally to defend China's "maritime rights and interests."[23] No official definition of the content or legal implications of the terms has been issued by official sources, though the State Oceanic Administration (SOA) considers them to consist of UNCLOS norms, international law, and domestic law, and notes that they extend beyond China's jurisdictional

[22] Ding, Ge, and Casey 2014 summarize the massive expansion of maritime enterprise in the PRC since ratification of UNCLOS, breaking it down by sector and province. There is no clear evidence of distributional conflict, as a rising tide seems to be lifting all boats – i.e., extensive growth is possible because the resource base has expanded.
[23] Recall discussion in Chapter 4, Section III.

waters.[24] Whatever their content, these rights and interests are the subject of several transformative changes to the functions of the PRC's domestic institutions.

Corresponding to this heightened legal activity geared toward protecting state sovereignty and maritime rights and interests was a transformation of functional roles for the Chinese bureaucracy. Some of these were purely administrative, and involved changes to the distribution of existing authority within the state. Establishment of Hainan as a province in 1988, rather than a part of Guangdong province,[25] is an example of such a modal shift. At a sub-provincial level, a comparable change occurred with the upgrade of the administrative status of Sansha City (on Yongxing Island in the disputed Paracel island group) from a county-level administrative division to a prefecture-level city in 2012. Although these administrative upgrades had significant effects on the bureaucratic ranks of various state actors, the degree to which such changes changed the practical responsibilities cannot be directly observed. The principle venue for careful observation of how the actual function of the state is transformed by internalization and implementation of the law of the sea is in the creation of new MLE agencies, with new missions and enhanced resources to implement PRC domestic maritime law.

Transformation of China's Maritime Law Enforcement

Two maritime law enforcement agencies were the principle beneficiaries of this new political priority to prescribe and enforce UNCLOS-based rules. In 1999, immediately after China's formal claim to a 200nm EEZ, the SOA began to devote substantial resources to its "China

[24] PRC State Oceanic Administration ODP 2014: 46. This official report vaguely notes that these maritime rights and interests emerge from "different legal positions" (在不同法律地位).

[25] From 1950 to 1984, Hainan was an Administrative Region Office (海南行政区公署) of Guangdong Province. From 1984 to 1988 it was the Hainan Administrative Region (海南行政区) of Guangdong province.

Marine Surveillance" force (CMS), tasked with enforcing the PRC's growing body of maritime law.[26] A CMS national headquarters was set up in Beijing in January 1999, signaling new status for a small, specialized agency created in the early 1980s primarily to implement the 1982 PRC Marine Environmental Protection Law.[27] The 1999 reorganization created new missions that required vessels and personnel, which initially came from SOA regional bureaus, located in Qingdao, Shanghai, and Guangzhou, but later came from vastly expanded budgets and new shipbuilding initiatives.[28] Following top-level approval from Premier Zhu Rongji and Vice-Premier (and later Premier) Wen Jiabao, the State Council allocated 1.9 billion RMB to equip CMS with 13 large oceangoing patrol boats and five aircraft.[29] A new round of acquisitions was initiated with the 12th 5YP and has led to even more rapid expansion of the MLE fleet.[30] These capacity upgrades reflect the political urgency of the task facing the Chinese MLE fleet. In the words of the SOA director, "[t]he struggle over the defense of maritime rights and interests is escalating daily, and the contest in the maritime domain is intensifying day by day…We will

[26] According to official descriptions of the agency, it has broad authority to administer and enforce maritime law in China's jurisdictional zones: "The State Oceanic Administration, a sub-ministerial agency in the State Council's Ministry of Land and Resources, is the organization most directly linked to the definition and defense of these maritime rights and interests. Its annual report, the Ocean Development Report 2008 notes that "[the SOA's] main responsibilities include (a) comprehensive coordination of ocean monitoring, scientific research, dumping of wastes and development and utilization, organization of drafting national marine development strategies and policies, and other marine programs; (b) establishment of ocean management systems and drafting of ocean laws relating to coastal belt, islands and sea areas under national jurisdiction, and dealing with foreign affairs concerning ocean-related treaties and laws; (c) marine economic operation monitoring, assessment, and information publication, and organization of the work in the field of energy saving and emission reduction and the adaptation to cli- mate change for oceans; (d) regulation of the order to use seas under national jurisdiction; (e) protection of island ecology and legal use of unmanned islands; (f) protection of the marine environment, marine biodiversity and management of marine nature reserves; (g) organization of marine investigation and research; (h) marine environmental monitoring and forecasting of marine disasters; (i) organization of international cooperation and ex- changes; and (j) maintaining national maritime rights and interests, implementing regular law enforcement patrols and managing the China Ocean Surveillance (PRC State Oceanic Administration ODP 2008).

[27] Author interview with SOA official (Hainan, December 2014).

[28] Martinson 2015: 9

[29] Su 2007

[30] The demand for MLE resources and capacity is articulated several times in the 12th Five-Year Plan for Marine Development drawn up by the SOA, in particular in its calls for the agency to: "Constantly strengthen the maritime patrol and law enforcement capacity. Further increase the time and space coverage of maritime right patrols and law enforcement for the jurisdictional waters, significantly improve the capability of emergency response to handle maritime rights violations and other illegal acts as well as on-site incidents, and reinforce the support capability for participating in the protection of security of international key sea areas and maritime strategic channels."

strengthen our patrol and law enforcement activities to routinely defend our rights and interests in sea areas under China's jurisdiction, and develop a CMS-military-diplomacy trinity coordination mechanism."[31]

Another MLE agency took on functional responsibilities that more clearly fall in line with the norms established in UNCLOS. In 1998, the Fisheries Law Enforcement Command (FLEC), was established under the Ministry of Agriculture in order to "adapt to the implementation of the new international maritime regime."[32] It complemented a vastly expanded set of administrative responsibilities for bureaucrats working on fisheries in the Ministry of Agriculture and those working on resource utilization in the SOA. FLEC received authorization for funding from the State Council to build another 14 mid-to-large sized cutters, adding capacity to enforce China's fisheries laws in the vastly expanded EEZ.[33] As of 2015, China's MLE forces boasted 100 large-displacement cutters in a fleet of some 205 vessels, several of which are recommissioned PLA navy vessels. The SOA has begun to train MLE operators with the navy,[34] and to arm their main vessels to support increasingly confrontational "rights protection" missions.[35]

The rights protection mission provided these agencies with a powerful argument for new resources and responsibilities. According to Chinese maritime policy experts, "as law enforcement activities in the EEZs increased, the CMS claimed that it needed to exercise police power while conducting law enforcement activities. CMS officials strenuously lobby for the right to command vital 'rights protection' missions."[36] Leaders of these MLE agencies

[31] PRC State Oceanic Administration ODP 2013: 2
[32] PRC State Oceanic Administration ODP 2001: 123
[33] PRC State Oceanic Administration ODP 1999: 11
[34] Martinson 2014
[35] United States Navy Office of Naval Intelligence 2015: 9-10
[36] Lin and Gao 2009: 84

understand their task as one of achieving "effective administration" (有效管理) and "actual control" (实际控制) of maritime space – especially in disputed zones – such that their practices would "embody present jurisdiction" (体现存在管辖) for the PRC.[37] The SOA's maritime-specific 5YP also confirmed that the state's MLE apparatus now holds dual functional responsibilities: to develop and manage the oceans and their lucrative "blue" economy, and also to "control" (控制) disputed maritime space with physical presence. These goals were explicitly linked, with SOA leaders reading the 12th 5YP to guarantee state "provision of resources to protect and expand space for development," especially resources for MLE missions in "waters under Chinese jurisdiction, where rights-protection cruises provide spatial and temporal coverage to further enhance the response to maritime violations." Closure had been implicit in much policy and practice to date, but this plan elevates closure (euphemized as "rights-protection") and, necessarily, rights-denial to other states claiming rights in these areas into a core mission of a major state agency.

These rights-protection missions became prominent with the operation of MLE forces in the territorial waters and contiguous zones surrounding the Diaoyu Islands. Beginning in 2006, at the behest of the PLA Navy East Sea Fleet commander,[38] Premier Wen Jiabao directly authorized "regular rights-protection patrols" (定期维权巡航) conducted by CMS units (支队) in jurisdictional waters surrounding the Diaoyu that are administered by Japan but disputed by

[37] PRC State Oceanic Administration 2010: 127. The CMS also has a responsibility to "display jurisdiction and embody China's sovereign rights" in contested waters (China Oceans Yearbook 2006: 164).
[38] See Martinson 2015: 10-12 for discussion of the sequence of events leading to the implementation of regular rights patrols.

China.[39] This decision followed on a commemoration of the 10-year anniversary of PRC ratification of UNCLOS, in which leading Party and state officials recognized that the new regime of the EEZ presented "challenges and opportunities." Among the challenges were other states exercising jurisdiction in zones to which China lays claim; this phenomenon presented an opportunity for China to step up its demonstrations of jurisdictional control (管控) to deny those competing claims.[40] The SOA's 2006 yearbook likewise highlighted the importance of competitive law enforcement, stating that "[s]ince UNCLOS came into effect, the struggle among coastal states, and between coastal states and maritime states, has been increasingly intense."[41] The practical purpose of the regular rights patrols is to "manifest jurisdiction" (体现管辖), a nebulous goal that plainly encompasses more than merely enforcing domestic law.[42]

Indeterminately drafted PRC law easily accommodated this change to begin operating regularly in waters effectively controlled by Japan because it had not defined the limits of PRC jurisdiction – perhaps precisely in order to scale up MLE when capacity allowed.

In 2012, China was operating at least nine vessels at all times in "rights-protection" missions but lacked sufficient capacity to conduct regular patrols of the disputed Senkaku area in response to what Beijing considered a Japanese provocation to directly lease four of the disputed islands

[39] Sun 2013: 4; Fan 2009: 11

[40] China Ocean News 2006, "纪念我国批准《联合国海洋法公约》十周年座谈会在京召开 [Forum marking 10th anniversary of our state's ratification of UNCLOS held in Beijing]

[41] SOA 2006: 164; author thanks Andrew Chubb for identifying these 2006 quotes and events in an unpublished draft manuscript.

[42] See Xu 2012: 10-12. Chinese sources often describe the rights-protection missions with the 12- character phrase "现实存在，体现管辖，宣示主权 [show presence, manifest jurisdiction, and declare sovereignty]" (Martinson 2015: 13).

from their private, Japanese owner.[43] Foreign policy considerations dictated a show of Chinese determination not to allow Japan to continue its uncontested exercise of jurisdiction over these disputed waters, and beginning in September 2012, the MLE fleet began to operate in the contiguous zone and territorial sea around the disputed features. The frequency and location of these patrols was modulated according to Beijing's policy preferences, but succeeded in demonstrating that the PRC was capable of scaling up its MLE operations beyond waters normally patrolled.[44] These practices were tailored expressly to undermine Japan's administration of those waters and normalize the (irregular) enforcement of PRC domestic law in disputed zones.

In charging MLE agencies to implement these tasks, authoritative documents explicitly framed their various activities in terms of their contribution to foreign policy, noting that: "the principles of 'highlight presence, ensure safety, manifest our sovereign rights and administration of these waters' were effectively implemented, and powerfully supported and complemented our government's diplomatic actions." These are nominally legal goals, yet lacking international legal basis. The constant recitation of these legal aims, untethered to legal rights secured in UNCLOS, constitute powerful evidence of the political drive to control maritime space. PRC practice is decoupled from the original norms, which assigned coastal states jurisdiction for the purpose of using resources and protecting the environment. Instead, PRC MLE agencies treat "rights-protection" and exclusion of other users as the principle aim, a prerequisite for other legitimate usage by commercial, scientific, and other actors in the PRC.

[43] Martinson 2015: 14

[44] Johnston and Fravel 2014. There is a wide range of reporting by Chinese, Japanese, and American specialists on the individual incidents of PRC MLE patrols in and around Senkaku territorial waters; close analysis of the individual events is not necessary to support the analytical claim that Chinese law permits flexible, ad hoc use of MLE assets to support foreign policy goals.

The political elements of the MLE mission and their decoupling from the more benign enforcement jurisdiction prescribed under UNCLOS are not at all obscure in the statements of leadership in the party and state. According to the director of the SOA:

> We will maintain the law enforcement patrols that have become normalized to safeguard rights and interests in the waters of the Diaoyu Islands. We will show our jurisdictional claims externally through ongoing patrols of the waters of the South China Sea under Chinese jurisdiction. We will move ahead in areas including selection of the scope of protection for territorial sea base points, management of place names in the South China Sea, research to determine the extent of the continental shelf extending beyond the 200-nautical-mile limit, and the naming of seabed places. We will move further ahead with comprehensive administration, and we will strike a 'combination blow,' the main elements of which will be legal, administrative, and maritime activities and public opinion propaganda. We will undertake systematic deepening of research and external propaganda on hot issues of maritime rights and interests.[45]

In order to better realize these multifarious functional purposes for MLE missions, a major bureaucratic overhaul went in motion with the 18th CCP National Congress in March 2013. This major transformation led to four of the so-called "five dragons" – state agencies responsible for MLE – being consolidated into one superagency, the China Coast Guard (CCG) under the SOA, with "operational guidance" from the Ministry of Public Security.[46] The plan detailed the CCG's "main functions and duties" as the following: "conducting ocean development planning, implementing maritime rights defense and law enforcement, supervising and administering the use of sea areas and the protection of the marine environment."[47] This reform remains a work in progress, but has established a broad functional responsibility for MLE as well as an organizational structure from which it can expand into new missions as circumstances dictate.

[45] Liu Cigui 2013
[46] All of its vessels and personnel will eventually be armed, reflecting a concerted effort to integrate MLE into China's broader security apparatus (author meeting with SOA officials, Beijing, September 2014).
[47] PRC National Party Congress 2013

The "reorganization" (重组) combined CMS, FLEC, the Border Patrol Force (under the People's Armed Police), and the maritime anti-smuggling police (under the State Council's General Administration of Customs), leaving only the Marine Safety Administration (under the Ministry of Transport) independent.[48] This move reflects the judgment of Chinese senior leadership that the MLE system was dysfunctional and had, in the words of one State Councilor, "insufficient ability to safeguard maritime rights."[49] By consolidating the MLE forces under one administrative roof, implementation could be centralized and coordinated in response to changing dynamics in maritime disputes.[50] Prior to the reorganization, a Chinese maritime policy and law specialist noted that "there are no clear cut functions for each agency; neither are there clear divisions between jurisdictional zones"[51] in which each of the five agencies had responsibilities. Internal bureaucratic coordination was deemed necessary for the MLE forces to perform the essentially external political mission with which they are tasked: using domestic law enforcement instead of military force as an instrument of foreign policy less likely to trigger strong reactions from other states. The use of civilian "white hulls" rather than navy "grey hulls" is judged to allow China to "pursue its maritime interests through a less assertive way."[52]

Official documents spell out the coercive function of Chinese "white hulls" as part of their formal repertoire. The SOA's annual Ocean Report in 2014 defines the transformed functional tasks of China's consolidated MLE force along the following lines: 1) declaratory implementation (宣示性措施) – showing presence and announcing to foreign users that the

[48] *Ibid.*
[49] Ma 2013; see also International Crisis Group 2013, "Dangerous Waters" report.
[50] Goldstein 2010; Yu 2012; Yu 2013; Hong 2014, Martinson 2015
[51] Hong 2014: 613
[52] Hong 2014: 614. The less escalatory nature of MLE paramilitary forces is a commonly cited example of China's "restraint" (克制) in pursuing its maritime claims, articulated on dozens of occasions in the author's interviews and workshops in China throughout 2014-2015.

space in question is under Chinese jurisdiction; 2) carrying out orders (责令性措施) – or practically enforcing Chinese domestic laws concerning sea use; and 3) coercive measures (强制性措施) – to include bumping vessels, water cannons, arrests of foreign fishermen, and a range of other tactics.[53] The SOA relied on domestic legal authorization to resource and carry out these new missions, noting that "MLE's legal basis is in the constitution, laws, administrative regulations, rules, and other 'normalizing instruments,' including UNCLOS and international agreements."[54]

These new functional roles were conceived and internalized into law with central policy priorities in mind. Practical implementation required centralized control to keep their activities within bounds dictated by foreign policy objectives. To this end, the State Council simultaneously founded a National Oceanic Commission (国家海洋委员会) designed to coordinate the complex work of the new CCG and the still-numerous administrative organs with maritime responsibilities. The Commission holds yet-undefined executive authority to streamline decision making, and presumably to oversee the broader project to "perfect" China's maritime legal system. Yet its precise composition remains unknown, and no evidence of the organ's activities is yet publically available.[55] Even Chinese experts with access to personnel in the Party and bureaucracy acknowledge that this process remains totally opaque and the practical

[53] PRC State Oceanic Administration ODP 2014: 262; See also Martinson 2016 for an excellent review of various MLE tactics.
[54] *Ibid.*: 259-265
[55] Hong Nong, May 2014 presentation at NISCSS; Author interviews with CCG and SOA officials (Hainan and Beijing July-August 2014).

extent of the reforms remains unclear.[56] Domestic law and regulation are the most reliable indication of the practical directions that senior party-state leaders intend to push China's maritime practices.

The reorganization demonstrates that PRC leaders recognize an opportunity to leverage the standardization and growing efficacy of legal institutions in China to better coordinate an unruly maritime apparatus such that it can directly serve political goals. The characteristic ambiguity of the regulatory process in play here gives free rein to political leaders to use the law as a rhetorical screen as they apply ad hoc discretion about how to achieve foreign policy aims to defend maritime rights and interests and secure disputed maritime space from competing claims. The changes wrought to maritime agencies in this period are powerful evidence of the potential for international law to influence the functions and capacities of domestic political-legal institutions. The set of rights and obligations in the EEZ created by UNCLOS defined and enabled the state functions now observed in a well-resourced Chinese MLE fleet carrying out ambitious and flexible new missions.

III. Augmenting the Content of PRC Rights and Jurisdiction

The prior two sections establish that the geographic scope of jurisdiction internalized into PRC law is broader than that prescribed in UNCLOS, as well as that formerly allotted in PRC law. In turn, the demand to enforce domestic law in the vast and contested new space of the EEZ entailed expansion of the scope of state responsibilities, demanding new functions for state

[56] Hong 2014; Yu 2013. In author meetings in the fall and winter of 2014-15, members of the reorganized agencies (specifically, the Fisheries Law Enforcement Command, General Administration of Customs, and the SOA's Maritime Surveillance Force) wore their old uniforms (not the CCG's new blue uniforms) and explicitly identified themselves with their old organizations. They indicated that the reforms were "in process" but that many aspects of them were administratively and bureaucratically "inconvenient" or otherwise obstructed.

agencies to implement domestic law. We are left to explore some of the substance of the laws that these agencies are tasked with administering and enforcing. These are principally rights to resources and associated jurisdictional competencies. This section tracks PRC law and practice with respect to the resource rights and specific jurisdiction allocated in UNCLOS III.

The pattern of indeterminacy in domestic law enables Chinese actors to steadily augment the *content* of those UNCLOS norms – observable most clearly in legislation, regulation and departmental rules that claim PRC jurisdiction over security and navigational issues well beyond the purely economic rights and jurisdiction granted under the treaty. There are also fairly determinate elements of UNCLOS that find their way more or less intact into PRC code; in these cases, the *content* is faithful to the underlying norm, but because claimed rights lie in geographic zones exceeding limits of the EEZ, the *scope* is broader than that prescribed in UNCLOS.

Augmenting the Content of Resource Rights

Among the central elements of closure are broad PRC claims to sovereign rights over resources and accompanying jurisdictional "creep" to maintain those rights. They are also probably the most tangible effects of China's internalization and implementation of EEZ norms. Media often portray China's maritime disputes as a competition over scarce resources.[57] This interpretation is incomplete at best, given opportunity costs of pursuing relatively modest resources of the SCS and ECS.[58] Contested property rights to the resources of the EEZ, however, are plainly implicated in much of the operational-level conflict among claimants and provide a ready rhetorical explanation for why states feel their claims must be pressed or relinquished.

[57] E.g. Fabinyi 2015, whose piece "China and the South China Sea Resource Grab" is representative of hundreds of newspaper and magazine articles citing resources as the basis for conflict.
[58] See Kardon 2013 for discussion of the insufficiency of resource explanations for the disputes.

Exploitation of non-renewable resources like oil and gas is a zero-sum economic arena. Perceptions that other states must, at minimum, be prevented from leasing, exploring and exploiting oil and gas blocks in disputed zones tend to drive policy decisions.[59] In theory, fisheries are more susceptible to non-exclusive control (fishing vessels of many flags can exploit the same fish stocks in the same areas); but in practice, the exercise of fisheries jurisdiction has also led to significant tension among claimant states competing to exercise administrative control over disputed fishing grounds. Resource rights are among the central goals for which domestic legal claims and rules are established.

Virtually all of the resource disputes concern waters that, were they delimited, would be EEZ. The EEZ's most significant economic feature is the exclusive authority it grants to coastal states over the resources of the zone – most notably, fish, oil, gas and minerals. The treaty regime prescribes a set of specific "sovereign rights" in Article 56(1)a, allocating to the coastal state what amounts to property rights over all of the living and non-living resources in the EEZ. Those rights are "for the purpose of exploring and exploiting, conserving and managing the natural resources" of the zone, which include rich fisheries (resources living in the "superjacent" waters), and the lucrative minerals and hydrocarbons of the seabed and subsoil.[60] Other articles in Part V lay out obligations associated with these rights, prescribing norms for the conservation and utilization of living resources (Article 61 and 62, respectively), precise rules for management of different types of fish and marine mammals (Articles 63 – 68), and procedures for allocating some resources to geographically disadvantaged and land-locked states (Arts 69 – 72). There is

[59] For a good summary of energy policy issues in disputed maritime zones, see Schofield 2012.
[60] These latter seabed and subsoil resources are also defined and regulated under the continental shelf regime in Part VI. The EEZ, however, is the dominant regime: it is later in time and explicitly encompasses all of the continental shelf rights (Article 56(3) states that the EEZ regime "shall be exercised in accordance with Part VI") as well as additional rights and jurisdiction concerning resources in the water column above the shelf.

little indeterminacy in the wording of the main article conferring sovereign rights, nor in the basic principle underlying the regime: the coastal state exercises sovereign rights over the *resources* of the zone, but does not enjoy full sovereignty over the territory.

Beginning with a frequently amended 1986 Fisheries Law, PRC has internalized these resource rights norms more or less fully intact. High political priority has been placed on staking out claims to resource rights in internationally recognizable ways, lest the full scope and content of China's sovereign rights be underestimated by other aspiring users of China's claimed zones. An SOA researcher wrote in 1988 that China's resources are "under threat" and that its legislators and administrators need to "pay attention to the seriousness of the situation, be farsighted, and actively strive for China's rights over maritime zones" lest it receive rights only in one million km^2 rather than three million km^2 of maritime space.[61] This scarcity argument is widespread in public commentary in China on the subject, and feeds a perception that China's economic development is threatened by foreign states attempting to expropriate long-held Chinese resources. Popular media and official comments demonstrate little or no appreciation of the fact that the EEZ *created* these rights during the 1990s. This reality is not lost on more specialized Chinese officials and scholars, who recognize that UNCLOS "has expanded the maritime space under Chinese jurisdiction, and provides the legal basis for China to develop and exploit the abundant resources there."[62]

Accordingly, PRC domestic law stakes claims to all of the substantive rights – which after all include any physical object within the zone.[63] The way in which PRC laws and regulations are

[61] Xu 1988: 18-20
[62] Liu Zhenhuan 1996
[63] With the exception of submarine cables and pipelines, which user states are permitted to lay due to international high seas freedoms that survive the Convention, articulated in Article 87.

constructed regarding resources, however, tends to conflate them with something approaching full territorial sovereignty over the entirety of the "blue territory" in which the resources reside.[64] Furthermore, in implementing these rules in disputed zones, China discounts UNCLOS provisions and general international law that suspend the allocation of the property rights to resources where there is no agreement over whose sovereign rights are valid. In doing so, the PRC's internalization and implementation effectively replace international legal norms and procedures. They purport to manage a disputed zone with PRC law, in which the scope and content of Chinese resource rights remains indeterminate and capable of swift redefinition or adjustment to correspond to present policy demands. The indeterminacy in PRC code leverages narrower indeterminacy in the treaty, but is amplified beyond recognition by dint of PRC standards for legal drafting and preferences for flexible rules that enable discretion for policy-makers.

The EEZ is first and foremost a zone of economic resources, but due to disputes and unsettled boundaries, a large proportion of the rights to those resources remain unsettled. This has given rise in many states to laws and implementing procedures that aim to mobilize the private sector to "use it or lose it" – that is, explore, exploit, and protect resources whose ownership remains in dispute. Chinese officials and scholars emphasize the centrality of resources, noting that "the *raison d'etre* of the institution of the EEZ and the continental shelf involves the conservation and management of natural resources. In this sense, the EEZ and the continental shelf can be

[64] Invocation of a "blue economy" or "blue territory" is ubiquitous in Chinese public discourse, and even among those who are well-versed in the law of the sea and recognize that an EEZ confers substantially less authority to the state than territorial sovereignty. For example, the most senior judge in the PRC views the entire maritime legal system as designed to defend China's "blue national soil." (Zhou 2015) http://www.straitstimes.com/asia/east-asia/china-wants-to-be-global-maritime-judicial-centre. It is also a consistent theme for state and party conferences, where it is used as a slogan to encapsulate a variety of economic development goals, e.g., a Hainan provincial forum on the "blue economy" (China Ocean News 2016, "推动蓝色经济由理念走向实践 [Pushing China's Blue Economy from Concept to Practice]).

considered as a 'resource-oriented zone.'"[65] Although these resource rights are widely recognized as the principle reason for state control, Chinese officials treat these sovereign rights instrumentally, a means to the end of establishing sovereignty, "embodying" jurisdiction, and effecting closure in its claimed maritime zones. In the words of then-director of the SOA, Liu Cigui, the PRC's domestic maritime legal scheme should "scientifically develop fisheries resources, rationally develop its oil and gas resources, and energetically develop its maritime tourism industry. By developing and using marine resources, China can manifest actual presence in the South China Sea and demonstrate its sovereignty over the islands and their adjacent waters."[66] The subsequent analysis focuses on fisheries and hydrocarbons as the main economic sectors in which sovereign rights prescribed in UNCLOS norms are transformed into an instrument of closure.

Fisheries sector. The origins of the EEZ concept lie in the demands of weak states that sought to secure their own rights and limit access of strong states with distant-water fishing (DWF) fleets capable of exploiting resources up to the limits of weak states' territorial seas.[67] The nature of the underlying property rights are substantially different from those to non-living, "non-fugitive" resources like real estate or minerals, which are fixed at a particular geographic point. Many species of fish migrate from one jurisdiction to another, for example by spawning in one state's river systems and growing to maturity in another state's EEZ (as in the case of anadromous stocks, addressed in Article 66). In consequence, the effective assertion of this particular class of sovereign rights means regulating fishing activities, rather than the fish themselves. This

[65] Wu and Zheng 2007: 1
[66] China Ocean News 2012
[67] Koh 1988 offers a compelling and thorough account of the development of EEZ norms as a coastal state response exploitation of nearby fishing grounds by larger powers with distant water fishing fleets (he also cites emerging technologies as driving the emerging norms). Tommy Koh (no relation to Harold) was President of the UN Conference on the Law of the Sea during its later sessions, and authoritatively confirms that protecting fisheries for weak states was the primary intent and purpose of the regime during negotiations.

characteristic of living resources has meant that China's assertion of control in this sector has manifested mostly in the form of fisheries law enforcement. PRC laws and regulations in this sector deal mainly with issues of *usage* rights; secondarily, they assign functional competencies to various agencies for managing and enforcing the lawful exercise of those rights.

The internalization of UNCLOS norms in this sector continues to be a high priority, touching directly on politically salient issues of economic development and maritime disputes. By claiming an EEZ and exclusive rights to its living resources, China stakes out a claim to a scarce and valuable resource. China's fishing industry is the world's largest, as is its DWF fleet.[68] The fisheries sector as a whole employs some fourteen million people, making it a substantial economic priority even absent maritime disputes.[69] It is also a sector facing urgent challenges in the form of rapid industrialization and scaling up of fishing practices that puts pressure on the large number of small-scale fishing enterprises. This growing exploitation is also a cause of rapid depletion and, in many instances, total collapse of China's coastal fisheries over the last several decades. Total catch in the SCS is now between 5% and 30% of levels in the 1950s due to overfishing and pollution,[70] leading to high rates of unemployment in the sector, underutilization of the fishing fleet, and a corresponding push by commercial and private fishermen to expand the

[68] Shen and Heino 2014

[69] Marine industries, broadly defined, are thought to account for 10-12% of China's GDP – see Greer 2016. NB – The 12th Five Year Plan set a target for maritime industries to account for fully 15% of GDP by 2020. Acquiring additional resources animates much overtly nationalist commentary about the extent of China's sovereign rights to resources. In one clear example, a popular maritime specialist and author Zhang Shiping argues that "China must really have its share of maritime rights and interests...to solve its issues relating to large population, inadequate resources, limited job opportunities, and so on! However, 'there is no savior' for China in its attempt to go to the ocean and take back its share of maritime rigths and interests. We the Chinese people can only rely on ourselves! In order to protect maritime rights and interests of our own, we Chinese people should be ready to use all effective means. These are the freedom and rights of the Chinese people!" (Zhang 2009: 169).

[70] See Heileman 2008 for a thorough report on the large marine ecosystem of the SCS. Not only have fish stocks themselves suffered, but the ecosystems that support their reproduction are severely degraded from environmental damage other than overfishing. According to a PRC fisheries official in 2016, such activities have destroyed 80 per cent of the coral reefs and 73 per cent of the mangroves present in the 1970s (Li Jing 2016b).

space in which they exploit these diminishing resources.[71] From an administrative standpoint, these abuses were also difficult to manage because the sector was highly decentralized, relying until recently on local agencies at the county level to determine and implement their own rules under minimal central supervision.[72] The various regulations for licensing, fishing equipment, fishing vessels, conservation, and ecosystem protection tended to vary substantially across China's coastal provinces.[73]

With the advent of the 200nm EEZ, however, the state had to manage a radical expansion of the geographic scope in which those decentralized responsibilities were to be resourced and coordinated. The banner piece of national legislation in this sector is the 1986 Fisheries Law, which has been revised and amended at intervals as China's fisheries management and administrative apparatus has matured.[74] Its main amendment occurred in 2000, accommodating the 1998 EEZ Law by finally extending fisheries provisions to formally cover the EEZ as well as the unknown "other sea areas under PRC jurisdiction." Despite the vagueness in the scope of China's claimed rights, the "rational utilization" and "comprehensive management" of living resources have been principle administrative ambitions in this sector, ends widely acknowledged to require a better-organized legal regime for fisheries. Most of the internalization and implementation of China's growing body of fisheries rules should be attributed to this rather mundane, technocratic objective. However, fishing has also been at the forefront of China's maritime disputes, and the MLE fleet nominally tasked with regulating the fishing enterprise has been an instrument of asserting China's claims to rights and jurisdiction in practice.

[71] Author interviews with fishing vessel owners and fishermen (Tanmen, PRC July 2014). See Mallory 2013 and Lebling 2013 for clear discussions of challenges to fisheries ecosystems in the SCS and ECS.
[72] Zou 2005; Xue 2004, 2008
[73] Author interview with Hainan province FLEC official (Haikou, July 2014).
[74] Major amendments occurred in 2000, 2004, and 2013, but implementing regulation and rules have been steadily revised at local levels since 1986; one search of PKU Law revealed over 2,135 instances of changes to local fishing regulations and measures (search performed by author 12 August 2015).

This alternative function for fisheries-related EEZ norms is most evident in the areas around the Spratly Islands in the southern part of the SCS. They are the site of the most hotly disputed fisheries, and their development has significant political implications well beyond their economic value. Then-director of China's South Sea Fisheries Law Enforcement Command,Wu Zhuang, told his detachment of law enforcement officers that the "development of fisheries near the Spratly Islands involves questions of sovereignty over China's Spratly Islands. Development equals presence, presence equals occupation, and occupation equals sovereignty."[75] However, no such development, presence or occupation were in effect until the mid-1980s, and all required major state efforts to initiate. Beginning in 1985, local authorities ordered fishermen in Hainan and Guangdong provinces to begin operating in the disputed waters around the Spratlys.[76] By 1988, China had seized several features in a small-scale naval conflict with Vietnam[77] and established rudimentary facilities on a number of unoccupied features.[78] The gradual push through the South China Sea to develop, occupy, and assert sovereignty – and thus closure – has been a comprehensive effort including the military, state and private sector, all enabled by gradually developed fisheries law and policy.

Among these enabling legal instruments are the 1987 Regulations for the Implementation of the

[75] Xiang 2012. Wu Zhuang told a conference attended by the Author in Beijing in September 2014 that he conceives of China's "blue colored land" for fishermen as equivalent to farmland for farmers. He is also quoted in a Chinese state television program saying that "where there's water there's fish, where there's fish there's fishermen, and where there are fishermen, there are FLEC" (China Central Television 2013). These statements plainly indicate the complementary nature of MLE functions and Chinese claims to resource rights.

[76] Author interview with fishermen in Tanmen township, a major hub for fishing in the SCS (Tanmen, PRC, July 2014); this pattern was confirmed in discussions with SOA and FLEC officials in Beijing (September 2014). Only 13 vessels operated there in 1985, but today there are over 1000 with regular presence in the area (Bai and Luo 2011: 5).

[77] The PRC occupies 7 of 100+ Spratly features as of June 2016. See Fravel 2008: 287-296 and Garver 1992: 1008-1013.

[78] Garver 1992: 1009. At least one of these, on Fiery Cross Reef, was the site of an "oceanic observation station" established by the SOA and the PLA Navy (PLAN) in 1988 on the basis of a UNESCO authorization to conduct a "comprehensive global oceanic survey," a body China had lobbied vociferously to acknowledge its "indisputable sovereignty" in this area.

Fisheries Law of the PRC.[79] These regulations deal with the "other sea areas under the jurisdiction of the PRC" ambiguity by defining them in similarly imprecise terms as "sea areas under the jurisdiction of the PRC in accordance with its laws and international treaties, agreements or other related international laws which it has concluded or to which it is a party." This plausibly refers to long-standing bilateral fisheries agreements with Japan, Vietnam and South Korea, although none of these acknowledge the exclusive Chinese fishing rights described in the regulation. The document directs fisheries authorities at the provincial and municipal level to determine areas for enforcement of domestic law "through consultation" with the central government (Article 4) but otherwise authorizes their discretion in implementing the terms of the 1986 Fisheries Law with "approval" by those same local-level departments. Article 41 notes that "the right to interpret these Regulations rests with the Ministry of Agriculture, Animal Husbandry and Fisheries." Wide interpretive berths granted for administrative agencies are, of course, the preferred norm in China's legislative and regulatory drafting, and allow the bureaucracy to adjust to policy that varies over space and time.

Until the late 1990s, local agencies under the Ministry of Agriculture were empowered to "lay down implementation measures of national laws according to the circumstances of their respective administrative regions. The fisheries authorities at all levels draw up local measures and rules to strengthen fisheries management."[80] But beginning in 1998, after China had acceded to the treaty and enacted its EEZ Law, Beijing began to exercise considerably greater centralized guidance over fisheries matters. The "seasonal fishing bans" (伏季休渔) are the clearest top-

[79] PRC State Oceanic Administration 2012: 573-583
[80] Xue 2004: 89

down measure in this vein, invoked first in the ECS and then in the SCS beginning 1999.[81] These were promulgated by the Fisheries Department in the Ministry of Agriculture, and forbid most fishing activity in substantial areas of waters that remain in dispute during the summer months when fishing stocks are most vulnerable. Defined by evolving Fisheries Department measures each year, the substantive restrictions of these summer fishing moratoriums have become more specific regarding the particular gear and catch that are permitted, while their geographic scope has expanded.[82] The enforcement of these bans against Chinese vessels has generally been judged inadequate.[83] Still, the ban has led to repeated diplomatic protests from Vietnam and the Philippines, whose fishermen are periodically arrested by Chinese MLE forces while operating in disputed waters.[84] Imposing and enforcing bans has been one of several ways in which nominal compliance with its obligations under UNCLOS (in this case, conservation of fish stocks) has allowed for gradual closure of maritime zones in which China claims exclusive authority.

Other laws and regulations stipulate various mechanisms by which the state can control and administer its fishing industry, which on balance enable the steady expansion of Chinese fishing practices to disputed zones, some of them beyond 200nm from any Chinese-claimed territory. Various province-level regulations empower local fisheries bureaus to license fishermen to operate south of 12 degrees north latitude (that is, in the Spratly area) without defining the outer

[81] Notice of the Ministry of Agriculture on Implementing the New Closing Fishing System in Summer Season on East China Sea and Yellow Sea (Promulgated by Order No.6 [1998] of the Fishery Management & Fishing Port Superintendence Division under the Ministry of Agriculture on April 2, 1998)
[82] At present the ban in the SCS is above 12 degrees north latitude, and in the ECS between 35 degrees and 26'30 degrees north latitude. See, for example, PRC Bureau of Fisheries 2009.
[83] Xue 2004: 127. Others argue that it is effective during the summer, but encourages overfishing during the periods before and after that wipe out any beneficial effects (Shen and Heino 2014: 269).
[84] E.g., Reuters 2015

limits of the zone.[85] The laws and regulations establishing and administering property rights and usage rights in sea areas[86] create a host of new functional tasks for MLE agencies, whose capacities have increased remarkably as a result of vastly expanded space and variety of responsibilities they now administer. Among the more substantial functional changes for fisheries law enforcement has been their close coordination with the fishing practices of local fishermen. Many PRC-flagged fishing boats are now equipped with satellite-linked phones to alert MLE vessels when they are in distress;[87] in Hainan and Guangdong, they receive fuel subsidies and MLE escorts from the provincial government for operating around the Spratly Islands.[88]

The much-publicized standoff between the PRC and the Philippines over Scarborough Shoal in 2012 vividly illustrates the implementation of Chinese rules claiming exclusive rights to fisheries resources. In this case, a group of Chinese fishermen were confronted by a Philippines military vessel for illegal fishing in the waters around the disputed shoal. Utilizing their satellite-linked phones, Chinese fishing boats summoned several armed CMS cutters who prevented the arrest of the Chinese fishermen and engaged in a 2-month standoff with Philippine vessels, barring their access to the shoal. The area is now under effective Chinese control, closed to foreign fishing and navigation (and potentially the site of artificial island building in the near future). Even in the midst the standoff, the Director of the SOA lauded the patriotism of the fishermen and professionalism of the CMS operators for carrying out their "vital functional

[85] See, for example, the PRC Ministry of Agriculture 2015, Regulations for Managing Spratly Fisheries Production
[86] e.g., the 2001 Law of the PRC on the Administration of the Use of Sea Areas (and associated 2006 SOA Regulations on Management of the Right to the Use of Sea Areas and Regulations on the Method for Registration of the Right to Use Sea Areas), the 2007 PRC Property Law, and an estimated thousands of local regulations and rules for managing fisheries in a variety of zones.
[87] "China's Beidou navigation system, its version of the U.S. Global Positioning System (GPS), is being installed on many Chinese fishing boats. It allows users to send distress signals and reach relevant authorities on shore in the event of a maritime conflict. Since 2010, Hainan province has spent $12.5 million on fitting navigation systems, subsidizing up to 90 per cent of the installation costs." (International Crisis Group 2012: 8)
[88] McDevitt 2016: 107; see also Ruwitch 2014

duties."[89] This "Scarborough Model" is still discussed reverentially in Chinese official and expert circles, constituting strong evidence for that community that effective control and protection of China's resource rights can be achieved with the MLE forces, and without armed conflict or unacceptable diplomatic consequences.[90] The extension of practical Chinese claims to fishing rights, in this instance as in others, contributed to a broad foreign policy objective to "proactively" defend China's maritime rights and interests.[91]

Hydrocarbon sector. A 1968 geophysical survey conducted by the international Committee for Coordination of Joint Prospecting for Mineral Resources in Asian Offshore Areas confirmed the presence of potentially large oil and gas resources in the South and East China Seas. [92] In light of this news, China and other East Asian states swiftly mobilized to expand and reinforce their resource claims. China has an especially acute interest in the resource potential of the region. As a net importer of foreign oil (since 1993), deeply reliant on shipments from the Middle East and Africa to meet overwhelming growth in domestic demand, Beijing is vulnerable to threats to its energy security. China's leadership and energy sector therefore prioritize diversification of energy supply, and especially prize any domestically owned hydrocarbon resources that are less vulnerable to disruption.[93] Estimates of recoverable resources issued by Chinese firms and analysts describe the SCS as a "second Persian Gulf,"[94] though such views are considered within the industry to be wildly overstated.[95] The likely value of resources within disputed areas is not

[89] China Oceans News 2012.
[90] Zhang Jie 2013: 28; Qin Hong 2012; Xu Fangqing 2012
[91] International Crisis Group 2014: 16, citing Xu Fangqing 2012 and Zhang 2013.
[92] The report claimed "a high probability…that the continental shelf between Taiwan and Japan may be one of the most prolific oil reservoirs in the world." Cited in Gao and Wu 2005: 1
[93] See Downs 2004; Kennedy 2010; Kirshner and Cohen 2012; and Kardon 2013 for discussions of China's energy security.
[94] See Li and Chen 2004: 8-11; for other examples, see Chen 2009 and Gong 2012.
[95] A U.S. Energy Information Agency special report on the South China Sea aggregates data from several industry sources and offers a mean assessment. Their February 2013 report leads with the caveat that "it is difficult to

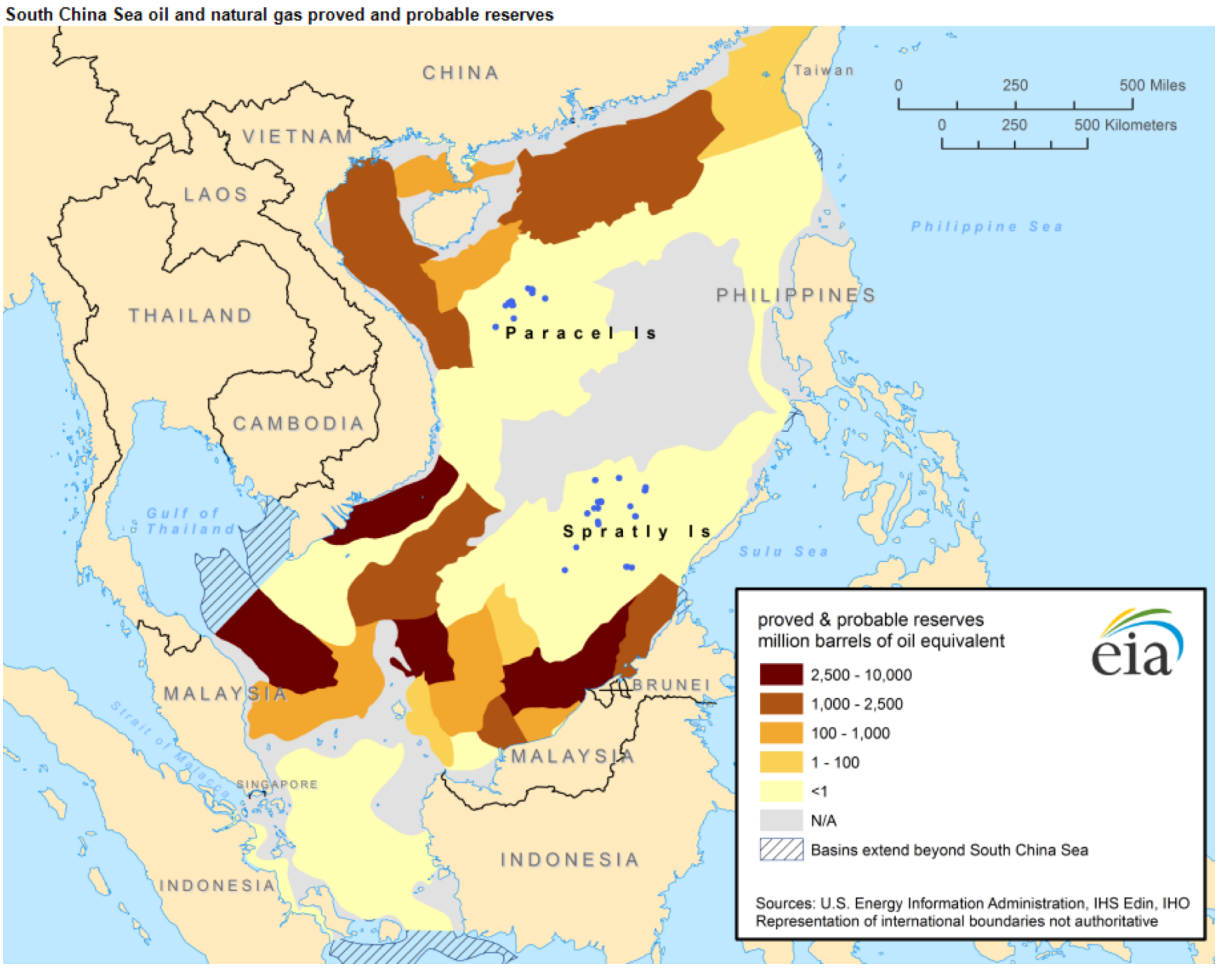
pertinent to this analysis; rather the issue to be treated is how the advent of the EEZ underpins China's claims to a substantial portion of these resources.

China's ambition to assert exclusive control over these resources, like that of other states, was enabled by an EEZ regime that dramatically expanded the scope of potential property rights to this vast zone. Importantly, the substantial estimated hydrocarbon resource base in the SCS is distributed primarily in the near-shore areas far beyond the extent of any 200nm zone extending from Chinese mainland territory (see Map 3 below).[96]

Map 3

determine the amount of oil and natural gas in the South China Sea because of under-exploration and territorial disputes." This disclaimer intact, the EIA estimates 11 billion barrels of oil (BBO) in reserves and 190 trillion cubic feet (Tcf) of natural gas reserves in the SCS. Compared to the much lower figure reported by the energy consultancy Wood Mackenzie (2.5 BBO of combined oil and gas), the EIA claims to present a figure "closer to a high-end estimate." See U.S. Energy Information Agency 2013.

[96] The distribution of probable hydrocarbon resources in the SCS is based upon geological and seismic surveys, discussed in detail in Owen and Schofield 2012.



Disputed offshore islands in the Paracels, Spratlys and Diaoyu thus provide the only link between China's EEZ entitlement and these lucrative resources, providing the only legal mode of acquiring sovereign rights to exploit them. Lacking any determinate domestic legal definition of the limits of Chinese jurisdiction, the PRC has internalized EEZ norms to legally establish exclusive resource rights to these potentially lucrative and politically desirable oil and gas reserves. In implementing its domestic rules as if there were uncontested PRC jurisdiction, China has launched only two significant efforts to develop oil and gas resources in disputed zones.[97] Instead of this riskier course of direct use of the disputed resources, in which foreign operational

[97] The first effort was a contract with the US energy firm Crestone in 1992 for WB-21 near the Spratlys; the second was the "Haiyang Shiyou 981" exploration operation near Triton island in the Paracels in spring and summer 2014, treated more extensively below.

and diplomatic protests might disrupt these time- and capital-intensive deep-water expeditions, the state has generally mounted diplomatic and operational campaigns to deny other coastal states access to this resource base.

Until recently, PRC state-owned energy firms lacked capacity to independently conduct offshore oil exploration and production, relying exclusively on foreign investment and technical expertise for that purpose.[98] The very first PRC sector opened to foreign investment was offshore oil, a reform initiated in the 1982 Regulations of the PRC on the Exploitation of Offshore Petroleum Resources in Cooperation With Foreign Enterprises.[99] These regulations were enacted "on the premise of maintaining national sovereignty and economic interests" (Article 1) and, correspondingly, have been applied in areas whose jurisdiction is disputed due to undetermined sovereignty over offshore islands. Despite tendering bids from foreign firms to develop resources in disputed oil and gas blocks in the SCS and ECS, China has not successfully contracted or unilaterally produced hydrocarbons in disputed waters.[100] Larger-scale PRC efforts at exploitation will likely follow on the development of sufficient MLE capacity to protect these operations in disputed zones. Chinese energy firms have already developed or acquired most if not all of the technological wherewithal to carry out exploration, production and transportation of hydrocarbon resources to market.

Despite manifest interest and growing technical capacity, there remains no definition of "offshore oil and gas" in the Chinese law. The main domestic laws establishing PRC claims to

[98] Zou 2005: 133; interview with US Department of Energy official (Beijing, June 2014); interview with China National Offshore Oil Company engineer (Beijing, June 2014).
[99] PRC State Oceanic Administration, Dept. of Policy, Legislation and Planning 2012: 534-541
[100] The American firm Crestone signed a contract with the PRC in 1992, but ultimately terminated it due to opposition from Vietnam, which also claimed the block in question, called Wan Bei-21 (Zou 2006: 88). A Chinese-owned deep water oil rig conducted exploration in another zone disputed with Vietnam in summer 2014 but has yet to return and produce any oil or gas as of Fall 2016.

sovereign rights over hydrocarbon resources are the 1986 Mineral Resources Law of the PRC (amended 1996), which is focused on land-based resources, but also defines the state's property rights over resources in "all maritime areas under [PRC] jurisdiction." With the 1998 EEZ Law, that definition now covered jurisdictional areas not only in the new 200nm EEZ, but presumably in areas where China claims other "historical" rights beyond the UNCLOS-defined entitlement (Article 14). The Mineral Resources Law offers only a blanket statement that "[m]ineral resources belong to the State. The rights of State ownership in mineral resources is exercised by the State Council" (Article 3). The "relevant state organ" charged with managing these rights within the State Council has changed substantially over the years since PRC ratification of the treaty, cycling through several bureaucratic bodies.[101]

The relatively underdeveloped law and unstable bureaucracy in this sector has left intact most of CNOOC's authority to act under the 1982 regulations cited above;[102] oversight over whether those exploration and production activities occur in disputed zones exists largely within the unobserved realms of economic and foreign policy-making. This political overlay has led to a checkered implementation pattern of PRC interference with foreign hydrocarbon exploration in disputed areas (e.g., around the Reed Bank, where the Philippines leased a concession, and in the western portion of the Spratlys, where Vietnam has attempted to develop resources). Until recent years, the principle mode of protecting Chinese-claimed sovereign rights to these resources has been physical interdiction of seismic survey vessels operated by other claimant states in the

[101] Authority for managing offshore oil and gas was at first dominated by the state-owned offshore oil firm CNOOC, which was nominally responsible to the Ministry of Land and Resources and high-level planners in the State Development Planning Commission, which was later reorganized as a National Development and Reform Commission. Efforts to centralize administration of this sector began with establishment of a National Energy Bureau in 2003, later reconfigured as a National Energy Administration in 2008, then as a National Energy Commission established in 2010 (see Downs 2004, Kennedy 2010).
[102] Author interview with Peking University international political economy professor, (Beijing, June 2014).

SCS.[103] In the ECS, China has proceeded with exploration and exploitation of the Chunxiao gas fields close to the provisional median line between Chinese and Japanese EEZ and continental shelf claims.[104] Domestic law, in principle, allows the State Council to authorize use of resources within all sea areas under China's claimed jurisdiction.

Implementation of China's laws proclaiming exclusive property rights to all resources under its undefined jurisdiction has been relatively conservative; the law's indeterminacy permits agencies to use their discretion in making decisions that will have foreign policy implications. In consequence, commercial exploration and production has for the most part been limited to undisputed zones. No permanent Chinese offshore oil and gas exploitation platforms have been established in zones beyond its mainland territorial seas. The only instance in which the implied scope of China's non-living resource claims has been fully implemented by the state was the HYSY-981 (海洋石油 981) episode of spring-summer 2014.[105]

CNOOC has tendered foreign bids for rights in disputed zones at several junctures in the past, most recently in 2012;[106] however, it was not until 2014 that CNOOC had sufficient technical capacity to conduct complex deep-water operations independently.[107] In May of that year, CNOOC began exploratory drilling some 17nm south of the Paracel Islands, in an area that

[103] Fravel discusses the pattern of Chinese MLE interference with Vietnamese and Philippine seismic surveying efforts, including cable-cutting and diplomatic threats (Fravel 2011: 306-307).
[104] International Crisis Group 2013: 29; Fravel notes that there has not been much competition for resource rights in this area beyond diplomatic accusations because of the relative weakness of the resource base in the area, according to a US Geological Survey, World Petroleum Assessment 2000 (Fravel 2010: 158).
[105] Author was based in Hainan during this period and analysis below draws on a roundtable held at the National Institute for South China Sea Studies and a series of follow-up interviews with maritime law and policy specialists, energy experts, and MFA officials in June-July 2014.
[106] Xinhua 2012, "中海油公布南海招标区块 [CNOOC announced SCS blocks open for bids]." With the exception of Crestone in 1992, no foreign firm has leased blocks in disputed zones.
[107] This capacity was gained through foreign acquisitions, most prominently of the Canadian oil and gas firm, Nexen, in 2013. See Rocha 2013.

Vietnam and China each considers to lie within its EEZ. This first foray into disputed waters involved not only the new, $1 billion HYSY-981 deep-water rig and its auxiliary vessels, but over 100 government vessels to protect the operation from anticipated Vietnamese opposition, drawing capacity from both local and national MLE fleets.[108] Bolstered by a perimeter of nominally private fishing vessels,[109] these forces protected the rig for three months, clashing a reported 1,416 times with Vietnamese private and government vessels seeking to disrupt the operation.[110] This particular escort (护航) mission was substantially scaled up from normal MLE operations and required a far greater level of coordination among the various agencies. It is an important illustration of the relationship between internalization and implementation, showing that MLE practice will follow capacity to actually enforce domestic laws assigning China sovereign rights and jurisdiction within disputed zones of the ECS and SCS.

"Other rights and duties provided for in this Convention"

In addition to the sovereign rights to resources detailed in UNCLOS Article 56(1)a, the Convention provides for "other rights and duties" in the EEZ in Article 56(1)c. There are manifold possible interpretations of what this provision means,[111] generating indeterminacy that has been exploited in China's more expansive conception of its rights within and beyond the EEZ. The language itself does not appear in Chinese code, but has been treated extensively in the

[108] Martinson 2016: 201
[109] Author interview with Chinese maritime energy expert (Haikou, June 2014).
[110] One Vietnamese vessel was reportedly sunk by Chinese MLE "bumping;" as part of a conference, the author visited the damaged vessel in a shipyard in Danang, Vietnam in June 2016 with a large media contingent and heard remarks from the captain of the vessel then discussed the incident with Vietnamese fishermen and local officials.
[111] See Tanaka 2012: 131 for discussion on this article.

scholarly arena and in academic curricula.[112] Undergraduate and graduate students specializing in maritime law, of which there are growing numbers, learn in Chinese law schools that a class of "surplus" or "residual" rights (剩余权利) and "vested interests" (既得利益) must be read into the EEZ regime.[113] These are unspecified rights and interests that the Chinese law of the sea community believes to have survived the codification of the new EEZ in UNCLOS III – especially those rights with supposedly "historical" character. Chinese legal experts argue that the indeterminacy of the Convention allows substantial interpretive leeway to coastal states in determining their own zonal entitlements: "[t]he systems of archipelagic waters, exclusive economic zone and continental shelf provided for by the Convention allow states to extend their sovereignty or sovereign rights to wider sea areas."[114] These rights do not need to be specified in any legal source, but may remain "tacit" or "latent" in the practice of states.[115]

These rights and interests are not positively created by the law of the sea, but in the Chinese view, neither are they explicitly foreclosed by it. The prevailing Chinese understanding of a mutable, indeterminate international law accommodates evolution and adjustment according to political realities (i.e., China's maritime interests) and can produce new rights to match changing circumstances.[116] In the words of a leading UNCLOS scholar at the East China University of Politics and Law, "the Convention has left ample room and space for an adjustment process of

[112] The author spent several months auditing Chinese law of the sea classes at Tsinghua University and enjoyed an entire class on this subject; law of the sea syllabi from Peking University and Dalian Oceans University also devote a lecture to the subject and assign some of the readings cited below.
[113] For detailed and influential exposition of this thesis, see Zhao 2004. It is now a standard assumption in LOS scholarship in the PRC, e.g., Wei 2014, Ge et al 2015. The subject is frequently discussed as settled law, both in journals and academic conferences (based on author attendance in several university seminars, interviews with UNCLOS scholars). The concept is also commonly explored in Ph.D. dissertations. There are over 200 mentions of "residual rights" or "vested interests" in Ph.D. thesis abstracts, based on author's CNKI Dissertation database search (14 Aug 2014).
[114] Zhao 2004: 147
[115] Gu et al 2015: 81
[116] Author interviews with law professors and maritime law experts in Beijing, Hainan, and Taipei (April 2014 – April 2015).

enlarging jurisdiction of the coastal states and reducing the freedom of high sea, largely due to residual rights contained in maritime law. Especially in the new area of the EEZ, the allotment of coastal state sovereign rights, exclusive jurisdiction, the freedom of high seas, and other states' user rights is not very clear."[117] Another Chinese scholar argues that it is unwise to take such interpretive liberties with the Convention, but rather that specified sovereign rights can be broadened by building a domestic legal regime that facilitates expanded practical use of resources and maritime space. Sovereign rights in the convention "should be converted into management rights under domestic law, rights that are not equivalent to full sovereignty. How to administer these international waters and expand our usage rights is the key consideration for our country."[118] Whatever the formulation, the prevailing view is that rights created in international law do not foreclose domestic laws that read in augmentations of their content.

These and other views are expressed in a growing body of Chinese work on the question of which rights exist in EEZs, and influence the vague legislation and regulations on PRC resource rights. An authoritative UNCLOS arbitration determined that the Convention cannot accommodate a "historic rights" claim on the basis of the U-shaped line claim.[119] However, the extent to which surplus or residual rights not named in UNCLOS can exist in practice is now being tested by China's assertion of these "other" rights, in the form of a historically-based claim to some type of resource rights that exist within its EEZ – as well as the EEZs of other states.

A historical basis for maritime sovereign rights? The U-Shaped Line

The discussion of "other" sovereign rights implies that the EEZ regime does not provide an

[117] Zhou 2004: 174
[118] Ge 2002
[119] This arbitration is the subject of an extension of this study, discussed in the Conclusion.

exhaustive account of the more broadly conceived maritime "rights" China attaches to its maritime interests. Although UNCLOS III is widely read to extinguish any other sovereign's rights to resources in a coastal state's EEZ, PRC law and practice demonstrate a claim to some kind of "historical" rights to resources within other states' EEZs. These putative rights are most vividly expressed in a now-infamous map, the U-shaped or 9-dashed line (U-型线 or 九段线).

Although maps do not, in themselves, constitute evidence of sovereignty or jurisdiction,[120] the map is the most visible manifestation of a claim with other content found in indeterminate domestic law, frequent if unclear diplomatic protests, and a growing body of practice in using resources and space well beyond the scope of UNCLOS-based sovereign rights.[121]

These rights are codified in only one national-level piece of legislation referencing the "historical" character of China's resource rights, the 1998 EEZ Law. In Article 14, that law pronounces that the EEZ law itself "does not influence the historical rights enjoyed by the PRC" (不影响…享有的历史性权利). This "historical rights" term does not appear in other legal instruments, but it is a critical component of leaders' characterizations of the claim. Discussing drafts of the EEZ law in 1996, Politburo Standing Committee member and State Premier Li Peng noted that these "historical" rights are an essential part of the undefined "maritime rights and interests" that the law is designed to "defend."[122] Earlier that year, the NPC Chairman Li Zhaoxing (also a Politburo member and later Foreign Minister) linked the existence of these

[120] Franckx and Benatar 2012: 90

[121] This study does not attempt adjudicate the legality of a PRC claim to some kind of historical rights within the U-shaped line; for our purposes, the relevant qualities are the indeterminacy of the claim itself and the development of a domestic legal scheme that does not clarify its intended meaning. The deliberate vagueness of the claim enables continuous adjustment of its intended meaning through practice. The map and associated practice amount to a claim that Chinese rights are not exhaustively defined by the Convention.

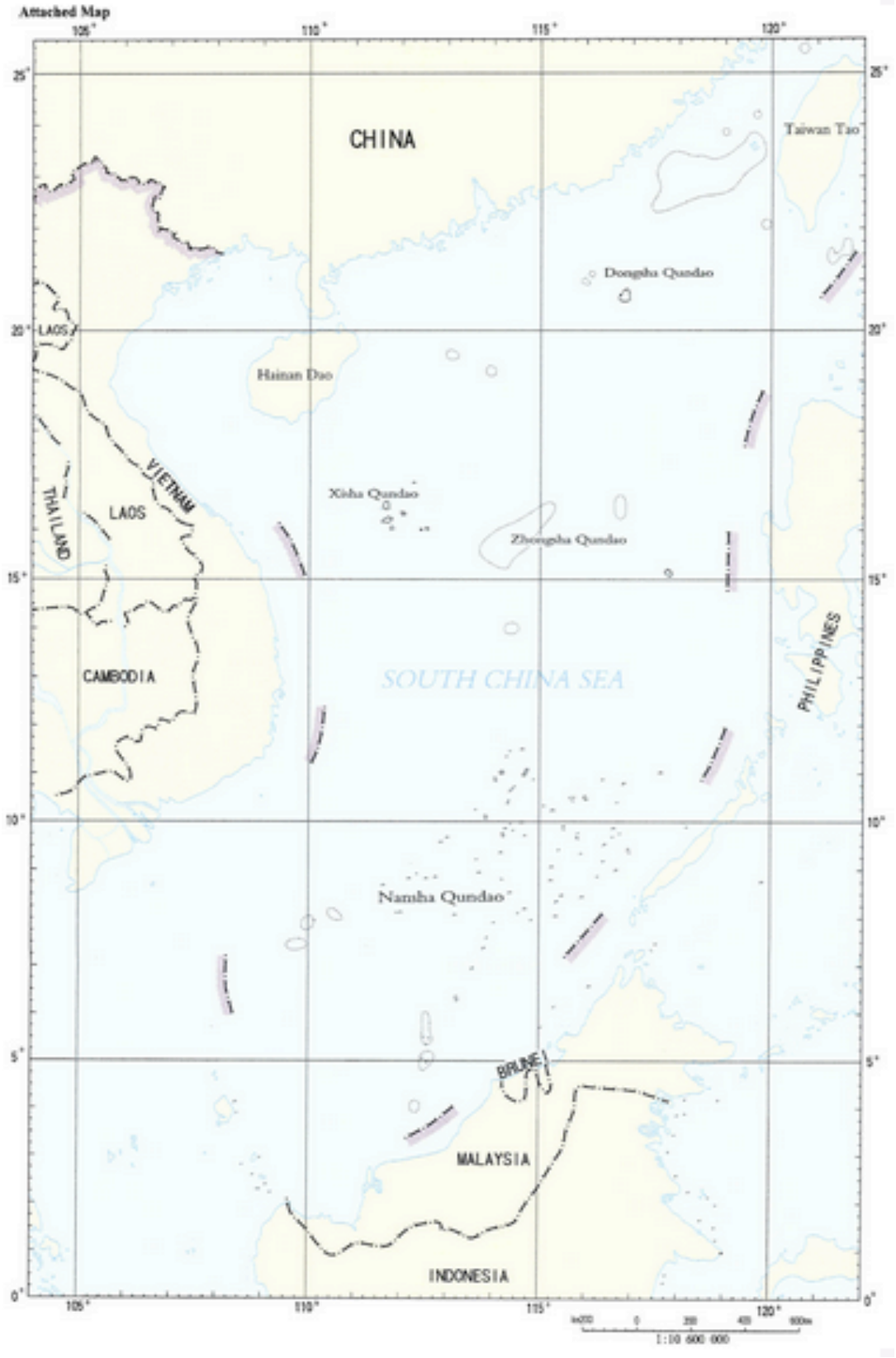
[122] *Xinhua* (24 December 1996) quotes Premier Li Peng on the EEZ Law: "the draft law was aimed to guarantee the exercise of China's sovereignty and jurisdiction over its EEZs and continental shelf, and safeguard its maritime rights and interests."

rights to the traditional fishing practices of the PRC, and announced that there was no conflict with UNCLOS because it "contains special regulations on historic waters." Li referenced the now-infamous "nine dotted lines which have long been marked and delineated in the Chinese map of the South China Sea."[123] The legal justification for this claim has far lagged the political commitment to maintaining it, but the thrust of that legal argument is that international law *beyond* UNCLOS furnishes "an ample legal and historical basis" for China's rights within the U-shaped line. All that is required is a "proper interpretation" – that is, one based on Chinese attitudes toward international law and interests in controlling vital SCS waters.[124]

China's attempted enhancement of its rights in the EEZ is best captured by this "9-dashed line." The map manifesting this claim was originally produced for internal use by the Republic of China (ROC) Interior Ministry in 1947, then published in a commercial atlas in 1948.[125] That map consisted of eleven dashed and dotted lines[126] circumscribing most of the water space of the SCS. No official pronouncement accompanied it at the time of initial publication, nor when the PRC government (re)issued the map in a *Note Verbale* to the UN in 2009 (see Map 4 below).[127]

[123] Li 1996: 278-279, cited in Song and Zou 2000: 332
[124] Quote from the former Director of the MFA's Department of Treaty and Law, who further explained that the claim is a "complex legacy of the Republic of China" that his agency must deal with as best they can despite its ambiguity (discussion with author at NYU Law School, October 2013).
[125] Gao and Jia 2013: 103
[126] Two lines were removed in 1953 by bilateral agreement with Vietnam, followed by China's relinquishment of its claim to White Dragon Tail Island (白龙尾岛) to North Vietnam (Fravel 2008: 268-269).
[127] PRC Permanent Mission of the UN 2009.

Map 4: China's U-Shaped Line as Submitted to the UN in 2009



(Source: PRC Permanent Mission to the UN 2009)

Much analysis of the claim represented in the map has succeeded, at a minimum, in confirming that its legal meaning is intentionally unclear.[128] Pressed to clarify, PRC officials have not been willing to offer any positive account of the substantive rights or functional jurisdiction depicted by the line. They have only asserted that it, at a minimum, composes part of China's historical evidence of sovereignty over the features within the lines and that some type of traditional or historic Chinese rights to resources exists within it.[129]

The map and associated practices lay out a highly controversial position that has generated substantial diplomatic fallout and growing foreign media scrutiny. Foreign law of the sea scholars insist that the treaty was designed to create uniform rights for all states, and cannot accommodate historical claims of this nature and scope.[130] The EEZ regime, in particular, is generally considered to have extinguished all manner of "historical" rights in areas that were formerly high seas, assigning resource rights and jurisdiction to the coastal state, and denying exclusive rights to traditional users.

Lacking any official government statements other than the inclusion of the map in its note to the UN and its now-mandatory use in official maps and PRC passports, the most authoritative Chinese brief on the subject to date was written by distinguished members of China's law of the sea scholarly community. This widely-cited piece was published in 2013, co-authored by a sitting PRC judge on the UNCLOS arbitral body (the International Tribunal for the Law of the Sea, or ITLOS), Gao Zhiguo. Gao also serves as an official in the SOA, and wrote the article in

[128] For discussion of this issue of maintaining vs. expanding claims, see Benatar and Franckx 2012; Li and Li 2003; Miyoshi 2012; and Thang 2012.
[129] The author met several times with officials from the SOA and MFA in the period between 2012 and 2016, none of whom was willing to offer a positive account of which specific historical rights are claimed. Increasingly, Chinese officials are referring to "traditional fishing rights" as the principle rights claimed in other states' EEZs, but there has not yet been an official declaration, act of policy, nor legislative confirmation of this.
[130] See, for example, Kraska 2011; Dupuy and Dupuy 2013

the *American Journal of International Law* along with a Tsinghua Law School professor, Jia Bingbing. Both have substantial training and experience in Western international legal circles.[131] They argue that China's claim is based in customary international law, which "supplements what is provided for under UNCLOS."[132] Its "legal purpose and status" is to confirm China's sovereignty over the features within the line and to claim – not simply the rights and jurisdiction to which it is entitled under UNCLOS, but also undefined other rights that predate the Convention and that therefore cannot be extinguished by the new law of the sea.[133] They do not attempt to establish the *factual* basis of China's effective control over the resources, only that there is a colorable legal claim that sovereign rights to those resources exist independent of UNCLOS.[134]

Chinese scholars like Gao and Jia work backwards from the fact of the 9-dashed line, claiming that the map means that some kind of historical rights must exist. PRC policy and practice are already in place, and PRC scholars and officials must therefore develop a legal justification. Despite their heroic efforts, the map confounds legal analysis in a variety of ways. The purported historical rights denoted in the map are nowhere specified in PRC law or policy – nor even fixed at any particular geographic location, contravening unequivocal mandates to make precise claims contained in UNCLOS Articles 16(2), 47(9), 75(2), 76(9) and 84(2).[135] Specific latitudes and

[131] Jia Bingbing holds a D.Phil in international law from Oxford and worked as a legal officer in the International Criminal Tribunal for Yugoslavia. Gao Zhiguo holds law degrees from American and Canadian Universities, and has been a part of ITLOS and other international legal organizations for several decades.
[132] Gao and Jia 2013: 99
[133] One of their claims, widely shared by Chinese commentators, is that the rights survive the Convention because of a doctrine of "intertemporal law" which argues that the law contemporary to the claim should be applied to assessing its validity
[134] The authors conclude that "[w]hile UNCLOS is a comprehensive instrument of law, it was never intended, even at the time of its adoption, to exhaust international law. On the contrary, it has provided ample room for customary law to develop and to fill in the gaps that the Convention itself was unable to fill in 1982 – due to the inherent limitations of a multilateral process of drawn-out negotiations" (Gao and Jia 2013: 123).
[135] Article 74(2) states that "the outer limit lines of the exclusive economic zone and the lines of delimitation drawn in accordance with article 74 shall be shown on charts of a scale or scales adequate for ascertaining their position.

longitudes are the minimum required in customary norms of delimitation. Neither the crude map itself nor any Chinese official document presents any geographical information about the locations of the lines, dots and dashes on the map.[136] The markings are not connected by any boundary line, offering no indication of how or whether the spaces in between them are to be understood. Even those lines, dots and dashes have been rendered in a variety of ways and in a variety of locations in different Chinese official and semi-official maps.[137]

The 9-dashed line claim represents China's most dramatic and large-scale transformation of the international norms underpinning the EEZ. It manifests the typical elements of expanded scope and augmented content, and represents an extreme in the Chinese tendency to construct legal claims to maximize flexibility at the expense of determinacy. In this case, the claim is based in part on norms that could not possibly derive from the EEZ itself. A US State Department study from 2014 notes that the map, as presented, plainly exceeds any possible entitlements based solely upon the EEZ regime: "all or part of dashes [2, 3 and 8] are also beyond 200 nm from any Chinese-claimed land feature. The dashed line therefore cannot represent the seaward limit of China's EEZ" (see Map 5 below).[138] Whatever the legal or historical bases for asserting such a broad and indeterminate claim, there is no doubt that this map and China's practice within it departs substantially from norms prescribed by the EEZ regime. [139]

Where appropriate, lists of geographical coordinates of points, specifying the geodetic datum, may be substituted for such outer limit lines or lines of delimitation" (UNCLOS III, Article 75.1)

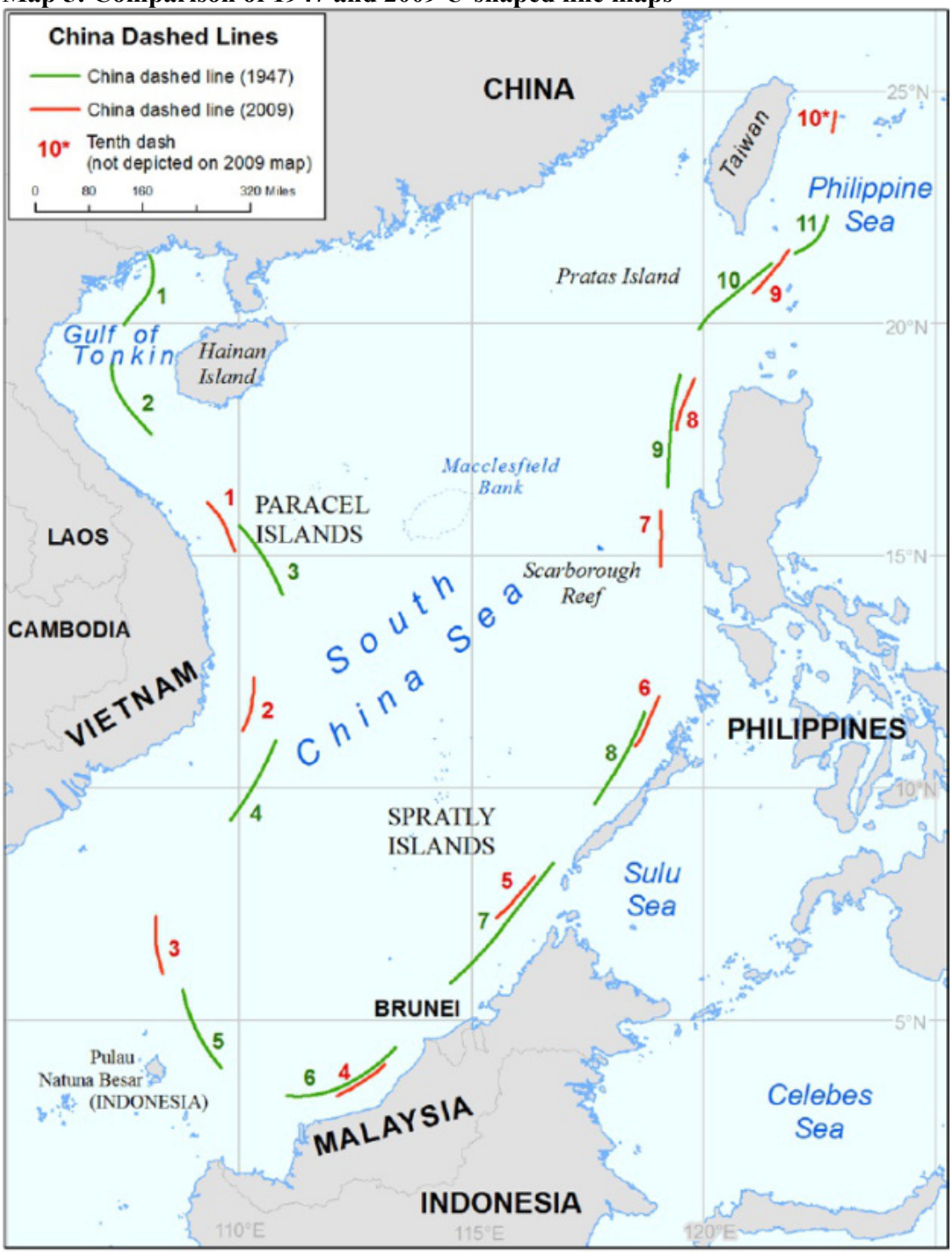
[136] The Chinese law of the sea community periodically voices support for some clarification of the claims, though without directly assaulting the validity of the map. Some encourage marginal clarifications on the basis of non-UNCLOS obligations, e.g., Zheng 2013: "China is a member of the International Hydrographic Organization [IHO] but did not follow the cartographic standards of this organization for international maritime boundaries in terms of territorial seas, contiguous zones, exclusive economic zones, continental shelves, and fishing areas."

[137] U.S. Department of State 2014: 5-7

[138] *Ibid.,* 15

[139] The existence of "historic rights" (as well as "historic title," "historic waters," and "historic bays" is a possibility under customary law and perhaps also in the Convention (bays and titles at a minimum). China has not explicitly

Map 5: Comparison of 1947 and 2009 U-shaped line maps



(Source: State Dept. Office of the Geographer 2014: 6)

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claimed rights under this customary regime, nor has any claim of this magnitude and boldness been tested in international courts or been negotiated bilaterally. This question may be addressed directly in the final award of a pending arbitration between China and the Philippines on this question (Republic of Philippines v. People's Republic of China, *Permanent Court of Arbitration*, 2013). [The case is ongoing and will be treated in a supplementary chapter after defense.) Case information is available at: https://www.pcacases.com/web/view/7]

The enactment of Hainan provincial fisheries measures in 2013[140] vividly illustrates this phenomenon of extending the scope in which China claims sovereign rights and augmenting the content of those rights on the basis of undisclosed "historical" factors. The Hainan provincial legislature's measures are intended to implement amended rules from the Fisheries Law, and state that those rules apply within the 2 million km^2 of maritime space under Hainan's jurisdiction. Neither the measures nor any other official normative document delimits that space, stating only its surface area. Only a partial account of the northern and eastern limits of Hainan's provincial jurisdiction is defined – and then, only in the relatively obscure 12th Five Year Plan of the Hainan Province Maritime Safety Administration (see Map 6 below).

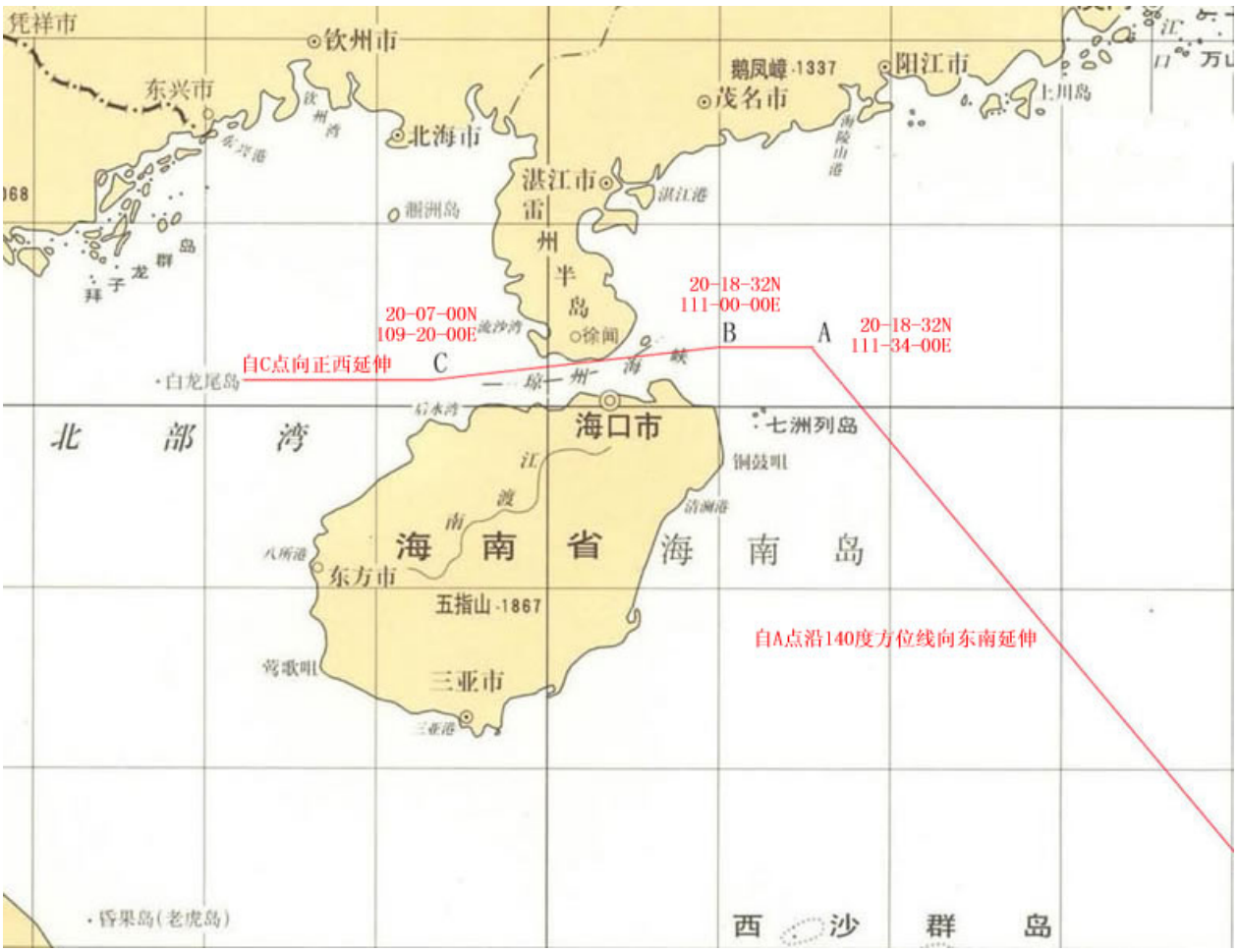
Given that the proposed two million km^2 volume of water space is substantially greater than any calculation of EEZs,[141] relevant agencies appear to be tasked with enforcement of PRC fisheries laws within the (undefined) U-shaped line, thus claiming fisheries rights that extend well beyond the scope allotted under UNCLOS.[142] The map and associated measures vividly demonstrate the indeterminacy that enables that scope to be enlarged or modulated according to the discretion of the local agents of PRC law. They are drafted with obvious disregard for the need to delimit or otherwise define the outer boundaries of those rights, and neglect to place any specific constraints the state's jurisdiction to administer Chinese activities pursuant to those rights.

[140] Hainan Provinces adopted implementing measures for the revised 2013 PRC Fisheries Law, called simply "measures" (办法) and available at http://www.hinews.cn/news/system/2013/12/07/016278991.shtml

[141] The PRC has not specified its EEZ claims, which would necessarily be provisional due to the existence of maritime boundary delimitation disputes in the East and South China Seas. Nonetheless, even hypothetically extending EEZs from all Chinese-claimed features, the zone created would be substantially less than two million km^2. See Beckman and Schofield 2014 for a creative approach to EEZ entitlements in the SCS.

[142] Subsequent sections explore the likely scope and content of China's claimed rights in those "other sea areas" in the context of China's "U-shaped" line.

Map 6: Hainan's Partial Northern and Eastern Jurisdictional Limit



(Source: Hainan Maritime Safety Administration 2011)

Chinese diplomats now partially specify the U-shaped line as a claim denoting, at a minimum, Chinese "traditional fishing grounds."[143] As Chinese fishing vessels operate further into the southern reaches of the SCS, they have come into increasing conflict with foreign MLE forces – notably, those of the Indonesian coast guard and navy in the area around the Natuna islands in the far southwest of the SCS. This area, unlike most of the rest of the SCS, lies beyond 200nm from any Spratly feature and is therefore the best geographic space to isolate the question of what, if any, historic rights the U-shaped line entails. China's fishing activities in this area make

[143] See, for example, PRC Ministry of Foreign Affairs 2016b; PRC Ministry of Foreign Affairs 2016c.

clear that it claims at least non-exclusive rights to living resources, a practice that has led to a Philippine decision to ramp up its enforcement and even confront Chinese MLE forces.[144]

The implicit specification of at least one type of rights indicated by the U-shaped line claim – that of "traditional" fishing rights – is a foreign policy decision enabled by a domestic legal regime sufficiently indeterminate that changes to the scope and content of claimed rights may be adjusted to suit circumstances. Because the PRC's domestic code does not prescribe UNCLOS III as the sole basis for arrogating maritime rights, there is considerable scope in practice for political elites to evoke non-UNCLOS but nominally legal justifications (like "traditional" rights) in support of policies that radically expand the scope and content of regime norms.

Specific jurisdiction for the coastal state

Alongside creating the new category of sovereign rights to resources, the other main component of the EEZ regime grants new modes of jurisdiction to the coastal state. These are intended as limited jurisdictional competencies, covering only specific activities in that zone: "(i) the establishment and use of artificial islands, installations, and structures; (ii) marine scientific research; and (iii) the protection and preservation of the marine environment" (Article 56(1)b).[145]

[144] Otto 2016; Cochrane 2016

[145] Environmental protection is beyond the scope of this study. Alongside fishing, it is probably the most fully developed regime in UNCLOS III, and the most constraining set of international norms prescribed in it. It is the only EEZ jurisdictional field that does not so much enable new activities as create obligations. These duties to avoid pollution and other negative externalities arising from exploitation of marine resources place environmental protection norms into direct tension with economic development. The Convention defines "pollution of the marine environment" in Article 1(1)[4] as "the introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities." The proscriptions on activities producing pollution come both in the form of a "general obligation" to "protect and preserve the marine environment" (Article 192) and as a set of specific obligations for coastal states within their jurisdictional zones, who are authorized to take "all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal and in accordance with their capabilities" (Article 194).

Rather than allocating property rights, these provisions assign competence to the state to both prescribe and enforce its domestic law on those defined activities.[146] China's internalization of these rules exploits indeterminacy in the EEZ regime to assign itself broader and deeper jurisdictional authority over those three classes of issues, even adding an additional "security" component to its claimed jurisdiction. In practice, PRC implementation of those rules has further augmented the content and scope of those codified provisions of domestic law, promoting a "creeping" effect whereby a limited source of jurisdiction becomes a writ for broader exercise of another related jurisdiction.

Artificial islands. In 18 months from 2014 to 2016, China reclaimed some 3,200 acres of land in the SCS with tacit authorization from domestic laws and regulations. Practically, it did so in large part by building artificial islands: dredging up sand, coral and sediment to cover a variety of small or submerged features, then constructing airstrips, ports, radar arrays, and other facilities over seven rocks, reefs and/or submerged features in the Spratly Islands.[147] The justification for this practice, in both Chinese and international law, rests upon lawful exercise of EEZ jurisdiction. Specifically, within its EEZ the coastal state has exclusive authority to build and maintain such facilities (which, typically, would be oil rigs, lighthouses, or scientific research equipment). Although these artificial islands now support infrastructure for military and intelligence activities, China's foreign ministry announced that "[t]he main purpose of China's construction activities is to meet various civilian demands and better perform China's

[146] Jurisdiction under international law is typically broken down into "jurisdiction to prescribe," which is the state's competence to promulgate law applicable to specified persons or activities (also called "legislative jurisdiction"); a second type "jurisdiction to enforce," referring to a state's authority to use judicial, executive, administrative, or police action to compel compliance with its law. (Dunoff, Ratner and Wippman 2006: 355-6).
[147] U.S. Office of the Secretary of Defense 2016: i. Major news outlets have published a large number of reports on this subject, for example, Page and Barnes 2015; Watkins 2016. The "Asia Maritime Transparency Initiative" has dozens of more specialized articles on this process, as well as a helpful, updated multimedia presentation on the characteristics of each of the artificially-enhanced features: http://amti.csis.org/island-tracker/

international obligations and responsibilities in the areas such as maritime search and rescue, disaster prevention and mitigation, marine scientific research, meteorological observation, ecological environment conservation, navigation safety as well as fishery production service."[148] Even if these are not the intended functions of the infrastructure, the claim to jurisdiction over those legitimate activities enables China to build military capacity in disputed EEZs. Chinese experts and officials emphatically claim that these activities are undertaken "within its sovereignty [sic]," although the plausible legal basis for the claim is jurisdiction over artificial islands in the EEZ.

If the PRC's EEZ jurisdiction in this area were indeed established and recognized by other claimants, those named functions would be lawful. However, because each of the features in question is the subject of a sovereignty dispute, and the zones in which the building took place are plausibly EEZs and territorial seas of other states, PRC jurisdiction is not established as a factual or legal matter.[149] Pending agreement among the disputants on whose jurisdiction is legitimately exercised in Spratly area, UNCLOS Article 74(3) instructs that "the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation." Although Article 74(2) does prescribe use of the Convention's Part XV dispute resolution procedures, these and other black letters of the Convention in no way provide a determinate solution to the problem of contested jurisdiction.

[148] PRC Ministry of Foreign Affairs 2015

[149] Some argue that because the PRC has not delimited territorial seas, EEZs, or continental shelf in the areas of construction that would "perfect" their claim, they are also forbidden from exercising jurisdiction as though those entitlements existed. (Author interviews with Pentagon officials, July 2015).

China's "solution" to date has been to presume its own jurisdiction, and implement its own laws on artificial islands in the disputed zones. China's domestic rules instruct its administrative and law enforcement agencies to operate as though that jurisdiction were uncontested, in the process seizing effective control of the features and their surrounding waters.[150] Each of the activities listed by the MFA spokesperson is among the specific jurisdictional competencies allocated to coastal states in their EEZs. That list enumerates the various tasks and responsibilities concerning artificial islands assigned to administrative agencies in legislation and specified in various regulations and rules. The major piece of national legislation on the subject, the 2009 Island Protection Law (passed not long before major construction activities in the Spratlys began) begins with a call to "protect the ecosystems of islands and their surrounding waters, rationally develop and exploit the natural resources of the islands, protect the maritime rights and interests of the state, and promote sustainable economic and social development" (Island Protection Law, Article 1).[151] Excepting the typical, non-specific "rights and interests" and "economic and social development," these are the basic authorities UNCLOS grants to coastal states in their EEZ. The SOA and other agencies and commissions given responsibility through this rule now enjoy new functional responsibilities related to these artificial installations that rely on UNCLOS norms.[152]

Subsequent departmental notices issued by the SOA cite this as the authorizing legislation for a variety of activities – from island naming, to development and construction of off-shore wind power facilities, to registration, examination and application procedures for usage rights, to

[150] The US Department of Defense 2016 Annual Report to Congress: Military and Security Developments Involving the PRC states that "although artificial islands do not provide China with any additional territorial or maritime rights within the SCS, China will be able to use its reclaimed features as persistent civil-military bases to enhance its presence in the SCS significantly and enhance China's ability to control the features and nearby maritime space" (Department of Defense 2016: 7).
[151] Full text available at: http://www.lawinfochina.com/display.aspx?lib=law&id=7851&CGid=
[152] A Japanese law of the sea expert argues that the 2009 law and associated regulations "have undeniably led to expansion of the interests of the [state] organs involved" (Takeda 2014: 16).

central budgetary allocations to commission environmental protection of islands and surrounding waters.[153] Although PRC jurisdiction over the islands was not yet established in practice during this preliminary period of internalization, the functional responsibilities of the agencies concerned were laid out in domestic law. The implementing rules treat those norms as applicable to maritime space in which there is in fact a dispute over which coastal state lawfully exercises jurisdiction.

Although marked by characteristically vague drafting and political sloganeering, these domestic rules do not adjust the scope or content of the EEZ norms prescribed in UNCLOS. Instead, the PRC's domestic law provides the justification for the action itself, and asserts maximal coastal state authority to the EEZ by ignoring another part of the regime, namely Part VIII, the "regime of islands." In asserting EEZ jurisdiction over island construction, the PRC treats all of its claimed features (all of which are disputed) – including artificial features – as though they were entitled to full-fledged island status, either singly or as a group. If there were uncontested PRC sovereignty over each of the features, and if one or more of the 140 islets, rocks, reefs, shoals, and sandbanks distributed over more than 410,000 km^2 in the south-eastern quadrant of the SCS were sufficient to meet the legal definition of an island, then the PRC would have clear-cut jurisdiction to build artificial islands within the EEZ.

[153] Documents retrieved from PKU Law (en.pkulaw.cn) on 5 April 2015: Notice of the SOA on Issuing the Measures for the Administration of Names of Islands (28 June 2010); Notice of the SOA on Issuing the Trial Measures for the Examination and Approval of the Application for Use of Uninhabited Islands (20 April 2011); Notice of the SOA on Issuing the Measures for the Registration of the Right to Use an Uninhabited Island; Notice of the Ministry of Finance and the SOA on Issuing the Measures for the Administration of the Use of Funds of the Central Treasury for the Protection of Islands and Sea Areas (2 June 2015).

At present, it is unclear whether any of the Spratly features is properly regarded as an island entitled to an EEZ and continental shelf.[154] Under UNCLOS Article 121(1), an island "is a naturally formed area of land, surrounded by water, which is above water at high tide." The critical yet vague Article 121(3) goes on to qualify that island category by designating an inferior type of island, "rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf." Such rocks, however, do enjoy 12nm territorial seas and 24nm contiguous zones. Islands and rocks are the only features that rate zones which grant sovereign rights and jurisdiction. "Low-tide elevations" (LTEs) are also naturally formed areas of land, but which are "surrounded by and above water at low tide but submerged at high tide" (Article 13). If they are located within the territorial sea, low water marks around LTEs may be used to bump out a coastal state's baselines. They may be used as basepoints for straight baselines only where "lighthouses or similar installations which are permanently above sea level have been built on them" (Article 7.4). Where necessary, coastal states may establish a maximum 500 meter safety zone around such artificial islands and installations (Article 60[4]). A final category of feature that is unnamed in the convention, and therefore not capable of generating any zones, is a totally submerged, even at low tide. Reefs, atolls, and other submerged features on the seabed may influence navigation, but may not be used as the basis for sovereignty, sovereign rights or jurisdiction under the law of the sea. Such features, if they lie within a coastal state's EEZ or continental shelf, are legally part of that state's seabed.

As many as four of the seven features upon which the PRC has built are either LTEs or entirely submerged features. No final determination has been made as to whether the other three features

[154] The UNCLOS arbitration between the Philippines and the PRC determined that none of the features is properly classified as an island under this article. The PRC's response to this award, however, leaves open the possibility that some extended jurisdiction will in fact be implemented in this zone – a subject for the extension of this study in future work.

should be considered rocks or islands.[155] Neither the PRC's Artificial Islands law nor various SOA departmental rules concerning uninhabited islands (real or artificial) make any distinctions among features along these lines, describing each island group as an archipelago or island group (群岛) and asserting full EEZ and continental shelf rights – from straight baselines surrounding them, in the case of the Paracels and Diaoyu, and without reference to any baselines in the case of the Spratlys. China's claims to the full slate of UNCLOS zones from artificial features – irrespective of their rock, island, or LTE status and lack of legal baselines – are not reconcilable with the Convention. In the case of the Spratlys, the claim to such zones does not appear in any domestic law, emerging only as a public declaration to the UN in 2011.[156]

The net effect is a broad and undefined area in the SCS that is implicitly a PRC-claimed EEZ. This cannot be observed from any specific demarcation of the zone, but rather from the PRC's implementation of its domestic laws to EEZ jurisdiction – in this case, to build and administer artificial islands, from which further zones are asserted in which China may exercise jurisdictional competencies (like the authority to regulate marine scientific research).1

Marine Scientific Research (MSR). After ratifying the Convention, the PRC began to internalize UNCLOS norms on MSR into its domestic legislation and regulation. Complementing this exercise of prescriptive jurisdiction, China also implements it by practicing enforcement jurisdiction over a wide range of activities that are implicitly regulated under indeterminate domestic rules on MSR. Chinese practice on this issue is enabled by the indeterminate way the various actions that can be regarded as MSR are defined in both the Convention and PRC law.

[155] [The Philippines-China Arbitration determined that those three features were all rocks, and each of the other four was either an LTE or seabed.]
[156] "China's Nansha [Spratly] Islands is fully entitled to Territorial Sea, EEZ and Continental Shelf" (PRC Permanent Mission to the UN 2011: 2).

This has manifested as a clear exercise of creeping jurisdiction, in which China construes the content of its rights and scope of its jurisdiction broadly in order to regulate a variety of activities that might be considered "MSR" – especially foreign uses – despite no express permission for that authority in international law.

The jurisdictional competence to "regulate, authorize and conduct" MSR in the EEZ lies solely with the coastal state, which may also provide "express consent" to foreign vessels to conduct such activities in its EEZ. This authority is provided for in Article 56(1)b, and elaborated in Part XIII, especially Article 246. The basic norm is that the coastal state has defined and specific authority to exercise its jurisdiction over a particular class of activities; these activities, however, are never exhaustively defined so limitations on them need to be inferred from the rest of the Convention. "Survey activities," "prospecting," and "exploration" are dealt with in other parts of the LOS Convention, and the activities of military vessels and aircraft are barely discussed in the Convention text, and then not in relation to MSR, which is thus by implication only a civilian activity. Likewise, hydrographic surveys are treated only in reference to transit passage through international straits (Article 40) and innocent passage through the territorial sea (Article 21[g]). The category of MSR is, for the most part, indeterminately defined by what it is not. Article 240 on "General principles for the conduct of MSR" mandates that "MSR shall be conducted exclusively for peaceful purposes" and further that it shall be conducted "in compliance with all relevant regulations adopted in conformity with this Convention." Lacking recourse to specific prohibitions on military surveys in UNCLOS, Chinese experts pressed to define the legal rule prohibiting such activities often lodge a generic objection to any and all military activities in their jurisdictional zones on the basis of the UN Charter's Article 2(4) proscription against the "threat or use of force." This catch-all appears furnishes the indeterminate legal basis for PRC

closure of the zone, and underpins PRC laws that pour additional content into coastal state jurisdiction over MSR.

China's internalized laws on MSR adopt a broad view of which specifically *foreign* activities can be lawfully regulated under that specific competence; no PRC law or regulation specifically addresses domestic actors conducting MSR, though authorities to do so are implicitly granted to the SOA.[157] In those rules, the PRC is consistent with the stance adopted by its representatives to the UNCLOS conference, who emphasized the coastal state's discretion to define its own competence to explore, exploit, manage and conserve resources under its domestic law.[158] Given an uncontroversial right to control MSR in its jurisdictional zones, China's domestic legal institutions seized this opportunity to elaborate functional and substantive authority to define the categories of activities that count as MSR, justifying it on the basis of the political imperative to protect maritime rights and interests.

The first significant domestic legal statement on the subject came immediately on the heels of the PRC ratification of UNCLOS, in the form of 1996 State Council Provisions on Administration of Foreign-Related MSR. Lacking a law on the EEZ at this stage, the sequence of these regulations and their focus solely on foreign activity is indicative of the priority to limit foreign access rather than promote domestic activity. This priority comes through clearly in the regulation's first article, which lists "safeguarding State security and its maritime rights and interests" among the "purposes" of the instrument. Its stipulations are also constructed broadly,

[157] Wu 2012: 299-300

[158] "If the coastal State did not have the right to protect, use, explore and ex- ploit all the natural resources in the zone, to adopt the necessary measures to prevent those resources from being plundered, encroached on, damaged or polluted, and to exercise over-all control of the marine environment and scientific research and regulate them, there was no point in speaking about full sovereignty over resources" (Ling Ching, PRC representative to the Conference on the Law of the Sea, 24th Meeting, 1 August 1974, in Official Records, Vol. 2, supra note 20 at 187).

applying MSR authorities in the undefined "other sea areas" of China, and neglecting to distinguish between civilian and military vessels.

The second important piece of MSR-related legislation is the 1992 PRC Surveying and Mapping Law (revised in 2002 to include the EEZ), which also neglects any civilian-military distinction. In Article 7 of that law, mapping or surveying activities by foreign organizations and individuals are subject to unnamed domestic PRC laws and regulations. Conduct of such activities is permitted only in the form of a "Chinese-foreign joint equity venture;" foreign surveying and mapping "may not involve state secrets or endanger state security."[159] Responsibility for overseeing foreign surveying and mapping lies both with the State Council's Ministry of Land and Resources (via its subsidiary State Bureau of Surveying and Mapping) and with the "competent department of surveying and mapping" of the PLA. These two laws endow the State Council and PLA staff with full discretion to determine which activities are prejudicial to state security, involve state secrets, of violate undefined maritime rights and interests. This practice tracks the political urgency of denying access, with the added sensitivity that maps (especially the U-shaped line and various historical predecessors) are among the key instruments of China's legal public diplomacy. Military surveys, meanwhile, are a significant element of regular US navy activities in the ECS and SCS. Hydrographic surveys, in particular, map the seabed and provide essential information for monitoring the locations and activities of Chinese submarines, now deployed at growing scale and with increasing operational and technical sophistication. Discretion to interpret MSR laws and regulations is at the heart of China's increasingly confrontational practice of attempting to deny access to foreign military intelligence-gathering and surveillance operations in its EEZ.

[159] 2002 PRC Surveying and Mapping Law, full text at: http://english1.english.gov.cn/laws/2005-10/09/content_75314.htm

Indeed, given the near-total lack of domestic rules governing domestic MSR, it is evident that the purpose and function of China's narrow domestic MSR regime is to restrict access for foreign vessels. Implementation of domestic rules on foreign MSR is explicitly linked to major foreign and national security policy issues concerning military (especially US) access to Chinese jurisdictional waters.[160] This political concern drove some twenty-nine central agencies and local government stakeholders, including the military,[161] to participate in drafting shared rules on "Strictly Implementing the Administrative Provisions of the PRC on Foreign-Related Marine Scientific Research." The note confirms that China's management of MSR has "embarked on a legal track" since the 1996 regulations, but challenges administrative agencies to better address the state's failure to prevent "unlawful" foreign MSR: "some people have given more account to the scientific aspects and less to the perspective of safeguarding national sovereignty and maritime rights and interests." The note further chastises unspecified administrative actions that have promoted "cooperation with the maritime powers such as the United States and Japan without being fully aware of foreign parties' attempts to collect China's marine information," and even notes that some officials have "unlawfully provided classified information to foreign parties." All of these actions "in varying degrees have violated [the 1996 regulations] and harmed China's sovereignty and maritime rights and interests."

Far from detailing differentiated tasks for the many stakeholders, the note instructs various

[160] Author interview with SOA official (Beijing, June 2014).
[161] The "Notice of the SOA, MFA, PLA general staff, Ministry of State Security, State Secrecy Bureau, Hong Kong and Macau Affairs Office, the Taiwan Affairs Office of the State Council on Strictly Implementing the Administrative Provisions of the PRC on Foreign-Related Marine Scientific Research" (10 December 1999), available on PKU Law [author search October 2015]. The notice also cites the provision's applicability to the People's Governments of coastal provinces, autonomous regions, and municipalities, the Ministry of Education, the Ministry of Science and Technology, the Ministry of Land and Resources, the Ministry of Communications, Ministry of Water Resources, the Ministry of Agriculture, the State Environmental Protection Administration, the Chinese Academy of Sciences, the Seismological Bureau, and the Meteorological Administration of the National Natural Science Foundation.

named agencies and local governments to simply use their discretion: they ought to take a "broad view" and "not establish any project which is not conducive to the national defense and security and maritime rights and interests" of the PRC. In a nod to consistency with the purposes underlying other engagement with international law throughout this period, the notice allows that "[w]here necessary, foreign technologies and capital can be introduced," but only where it does not undermine defense of China's claims in its maritime disputes. "All cooperative research projects to be conducted in disputed sea areas or sea areas which China finds difficult to control at this stage shall be determined according to China's appropriate foreign policies." The foreign policies in question concern China's maritime disputes, which guide practical efforts to achieve closure in those zones on the basis of broadly construed legal authorities to enforce Chinese domestic law. These implementation duties have largely fallen on MLE agencies whose principle tasks have effectively been to restrict foreign activities that do not concern MSR[162] – especially military intelligence-gathering and surveillance operations undertaken by the US navy.

Security jurisdiction in the EEZ

China's law challenges the exclusively economic nature of the EEZ, especially in claiming undefined jurisdiction over security matters in that zone. In implementing domestic law that regulates a wide range of activities under the premise that they touch on economic matters – and in some cases without even that justification – the PRC exploits indeterminacy in the UNCLOS-prescribed balance of rights and interests between coastal and user states. In arrogating to the state broad and ill-defined authorities to promulgate and enforce domestic law in claimed jurisdictional waters, PRC law enables bureaucracy and MLE agencies to act on the basis of

[162] See SOA departmental rules on this subject in "Notice on the Law Enforcement Supervision for the Foreign-Related Marine Scientific Research" (16 May 2000), retrieved by author from PKU Law, April 2014. See also Zou 2005: 301

undefined "security" concerns in claimed EEZs. This possibility draws China into conflictual situations not only with its maritime neighbors, but also with the US navy, which prizes access to disputed waters in the western Pacific. China's internalization transforms norms regarding economic issues to encompass a far wider range of activities, especially those that touch on its security.

Article 73(1) of the Convention states that "[t]he coastal State may, in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone, take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with this Convention." The language is clear that authority to "take such measures" is linked to the coastal state's exclusive economic rights in the EEZ. The intent and purpose of this drafting is plainly to grant enforcement jurisdiction to coastal states whose sovereign rights to resources are in some way challenged by foreign users, presumably through economic activities to exploit fisheries, oil and gas. Nonetheless, China's 1992 Territorial Sea Law, 1996 Regulations on MSR, and 2002 Surveying and Mapping Law each prescribe jurisdiction to the state relating to "national security" interests,[163] a broad authority that has been implemented largely by MLE agencies without further elaboration as to what activities constitute threats to security.

The principle arena in which this claimed jurisdictional competence comes into play is the PRC's practice of challenging military activities in the EEZ – especially those of the United States. With its Seventh Fleet forward deployed in Yokusuka, Japan, the US navy routinely conducts

[163] The 1992 Territorial Sea Law (Arts. 1 and 7), 1996 MSR Regulations (Art. 1), and 2002 Surveying and Mapping Law (Art. 7) cite "security" or "national security" without further definition of those terms.

exercises, patrols, drills, and intelligence, surveillance and reconnaissance (ISR) missions in the waters beyond territorial seas along the East Asian littoral.[164] PRC law and regulation do not expressly forbid such activities; instead, indeterminate drafting affords MLE agencies considerable discretion to operationally contest American naval activities in its EEZs and "other areas under PRC jurisdiction." The decisions as to when, where and how Chinese state actors seek to enforce closure in these zones appear to track broader foreign policy calculations,[165] though there are no reliable, publically available data that demonstrate the pattern or frequency of these operations. Undefined "security jurisdiction" does not dictate which actions are infringements of PRC law, but rather enable Beijing or MLE agencies to make that determination according to the circumstances.

Two pieces of national legislation underpin a growing practice of contesting US navy ISR operations, in each case finding the legal authority to do so on the basis of undefined security jurisdiction. The first is the 1992 PRC Law on the Territorial Sea and Contiguous Zone states that "China has the right to exercise control in the contiguous zone to prevent and impose penalties for activities infringing *[PRC] laws or regulations concerning security,* the customs, finance, sanitation or entry and exit control within its land territory, internal waters or territorial sea" (Article 13, italics added). The contiguous zone is, from a resource rights standpoint, simply a part of the EEZ; from a jurisdictional standpoint, it includes additional coastal state competence over customs, finance, sanitation, and immigration (UNCLOS III Article 33(1)a) – otherwise the coastal state authorities are identical to those in the EEZ. UNCLOS lays out a

[164] O'Rourke 2016 surveys all the major US policy issues related to disputes in the EEZ.

[165] The decisions about when, where and how to interfere with American vessels and aircraft have varied based on what one PLA Navy academic described to the author as "Beijing's vulnerability at that very moment" (author interview with PLA Navy academic [Beijing, March 2015]). There may be a more systematic or at least patterned basis for PRC responses to ISR missions, but these cannot be directly inferred from open sources.

comprehensive and exhaustive account of coastal state jurisdiction in the contiguous zone, developed mostly to prevent "hovering" just beyond coastal state jurisdiction by vessels looking to smuggle goods to and from ports. The PRC's inclusion of "security" among its jurisdictional competencies is among the most clear-cut instances of augmentation of the content of coastal state jurisdiction.[166]

The second piece of national legislation indicating security jurisdiction is the 2002 Surveying and Mapping Law. Article 7 of that law states that "surveying and mapping may not involve state secrets or endanger state security." Here, Chinese experts suggest that military surveys are regulated under Chinese law and are intrinsically threatening to the coastal state. Some point to UNCLOS terms that reserve uses of the EEZ "for peaceful purposes" (Arts 58 and 246) and to the treaty's general emphasis on "peaceful use" of the oceans (e.g., in the Preamble, Art. 301, and Annex VI). While there is no further elaboration in domestic law, the general interpretation forwarded by the Chinese law of the sea community is that "[t]he activities causing such disputes [over peaceful uses and peaceful purpose] are mainly military surveys, military maneuvers, military reconnaissance activities and other activities not having a direct bearing on passage or overflight conducted by foreign military vessels and aircraft in the EEZ and in the air space above it. The coastal countries hold that these activities are encroachments on their national security because they are an electronic prelude to invasion and thus a threat to use force, and therefore not a 'peaceful use' of the sea."[167]

This claim to security jurisdiction has been the subject of regular, targeted US navy assertions of

[166] China is hardly unique in this regard. One analyst assesses 60 states who "have asserted extended rights" to security jurisdiction (Kaye 2014: 339).
[167] Ren and Cheng 2005: 143

UNCLOS-derived rights to operate military vessels in the EEZ since at least 1992.[168] No other statutory or regulatory basis exists for this unofficial, intermittently enforced Chinese ban on military activities in its EEZ. Although it has existed on paper since 1992, it was not until 2001 that Chinese aircraft and surface vessels began directly challenging the operation of American military activities in areas beyond its claimed territorial sea. The most dramatic of these challenges came during in the 2001 "EP-3 Incident," in which a PLA Air Force fighter jet collided with US Navy electronic surveillance aircraft operating near Hainan island in the SCS.[169] At least 10 subsequent incidents, beginning in 2002 then in each year since 2009 have involved Chinese military, MLE and/or civilian assets coming into close contact with foreign vessels and aircraft operating in and above PRC-claimed EEZs.[170]

There is no specific invocation of the relevant domestic laws or regulations that justify PRC contestation of these operations, only the blanket assertion that foreign military activities in EEZs are not permitted under UNCLOS or PRC domestic law.[171] Officials from the PRC Ministry of National Defense have more recently described China's asserted security jurisdiction less as a matter of law than one of prudence: if the United States and other foreign military vessels and aircraft were not conducting "threatening close-in surveillance" of waters

[168] The US "Freedom of Navigation" policy began in 1979, and involves diplomatic protests of "excessive" maritime claims by the Department of State complemented by operational assertions conducted by the Department of Defense. For US Navy views on China's excessive maritime claims, see United States Navy Judge Advocate General 2015; for the locations (but not frequencies) of US operational assertions, see the United States Department of Defense, Annual Freedom of Navigation Reports at: http://policy.defense.gov/OUSDP-Offices/FON/

[169] See Redden and Saunders 2012 for a thorough discussion of this incident. EEZ rights do not include control over airspace, but China's practice tends to apply similar restrictions to aerial overflight.

[170] There are presumably unpublicized incidents, but those that have been reported in open sources include confrontations between Chinese vessels and the following foreign vessels: USNS Bowditch (March 2001); EP-3 Incident (April 2001); USNS Impeccable (March 2009); USNS Victorious (May 2009); USS George Washington (July-November 2010); U-2 Intercept (June 2011); INS [Indian Naval Ship] Airavat (July 2011); INS [Indian Naval Ship] Shivalik (June 2012); USNS Impeccable (July 2013); USNS Spruance (July 2013); USNS Cowpens (December 2013); unsafe P-8 intercept (August 2014); unsafe EP-3 intercept (May 2016). See O'Rourke 2016: 12-13 for discussion of these incidents.

[171] Dutton (ed.) 2010 is composed of papers from a conference treating the various American, Chinese and international views on the relevant rights and important security issues involved in this question.

surrounding China, testing China's coastal radars and communications, and monitoring their growing submarine fleet staged out of the SCS, then China would not need to "implement its domestic law" forbidding such activities.[172] Clearly, the security questions arising from military activities in close proximity to Chinese territory and military assets are not in themselves generated by the existence of the legal norms of the EEZ regime.

Whether or not China practically implements its "security jurisdiction" likely remains at the discretion of the PLA, or the SOA and Ministry of Public Security operating China's Coast Guard. There may also be some discretion at lower levels of authority, though the lack of published departmental rules specifically laying out how and when military surveys are to be contested means that such decisions are made ad hoc. Presumably, the overall political and operational effects intended of these practices are determined by foreign policy decision-makers in Beijing, then communicated down to the operational level only partially through legal channels. Such decisions are likely undertaken within central Party leadership (possibly in the Maritime Affairs Leading Small Group or the Politburo Central Committee, though there is no virtually transparency in the national security decision-making process).[173] As observed in the several other functional domains reviewed in this chapter, the legal hierarchy is not itself a script for the actions of state officials and bureaucrats, only an organizational framework through which policy signals may be more efficiently conveyed to those charged with implementation. The laws, regulations and rules canvassed demonstrate, however, that the various functional responsibilities undertaken by administrative and MLE actors, and to some degree, the resources allocated to them to do so, are enabled by China's distinctive mode of internalizing international

[172] Presentation by MND official to US former diplomats and military officers (Beijing, September 2014).
[173] See Saunders and Scobell 2015 for a thorough discussion of the PRC's national security decision-making apparatus.

norms of the EEZ regime.

Practice Makes Perfect

A prominent researcher in a state think-tank notes that "[t]he maritime rights and interests enjoyed by our nation did not fall from the sky, nor did they arise from our subjective desire or expectation to have them. They arise from the law, are bestowed by the law — international law to be precise, and especially the part of the law represented in UNCLOS….Without UNCLOS we would not have our [1992] Law on the Territorial Sea and Contiguous Zone and our [1998] Law on the EEZ and Continental Shelf….[UNCLOS] is a critical legal weapon that we must use to defend our maritime rights and interests."[174] The EEZ regime creates an entirely new set of sovereign rights and a new brand of jurisdiction that enables new interests in closure. Clearly, a state's interests in security and economic development exist independent of any legal regime. Yet the geographic space in which those interests are pursued, and the nature of the Chinese claims and practices to defend those interests, manifestly depend in fundamental ways upon the legal norms brought into being by the EEZ. Similarly, the territorial sovereignty disputes over islands that make these interests more pressing exist independent from the law of the sea; yet it is the jurisdiction and sovereign rights bestowed by the law of the sea that make these disputes touch on critical security and economic interests.

The distinctive aspect of China's relationship to the law of the sea regime highlighted in this Chapter is the way those international norms are transformed as they are internalized and implemented by the PRC. In turn, those norms exert a transformative influence on China's domestic legal institutions by expanding the scope of claimed jurisdiction, and augmenting the

[174] Liu Nanlai 2013

content of claimed rights. In order for those rights and jurisdiction to be administered and enforced, the state is prompted to devise new functional responsibilities for the state. This Chapter assessed each of these – expanded scope, transformed functions, and augmented content – and demonstrated how each manifested in the law and practice of the PRC.

How can these plain departures from the original norms persist? The obligation for state parties to UNCLOS III to "harmonize their national legislation with the provisions of the [Convention]" has been reaffirmed in the UN General Assembly each year since the treaty went to effect.[175] In the context of the Chinese political-legal system, such "harmony" need not eliminate stark contradictions between PRC law and the ratified treaty. There is no constitutional or statutory rule that *requires* China to conform its domestic law to its treaty obligations; even if there were, there is no expectation in China that law will be drafted and implemented in the determinate form that could regularize compliant practices. Even if state agencies were to attempt strict conformity with domestic laws, regulations and rules, they probably could not do so uniformly. China's legal institutions are after all only an adjunct to its policy-making and policy implementation processes, arenas dominated by the CCP and subject to its political discretion at every stage from drafting the language of the rules to their practical enforcement.

This analysis of China's internalization and implementation of the EEZ confirms that international norms from UNCLOS enable new "maritime rights and interests" that underpin these political decisions. The vast new area subjected to coastal state jurisdiction and sovereign

[175] See, for example, UNGA resolutions 68/70, 9 Dec. 2013, paras. 5-6; 67/78, 11 Dec. 2012, paras. 5-6; 66/231, 23 Dec. 2011, paras. 5- 6; 65/37, 7 Dec. 2010, paras. 5-6; 64/71, 4 Dec. 2009, paras. 5-6; 63/111, 5 Dec. 2008, paras. 5-6; 62/215, 18 Dec. 2007, paras. 5-6; 61/222, 20 Dec. 2006, paras. 5-6; 60/30, 29 Nov. 2005, paras. 5-6; 59/24, 17 Nov. 2004, paras. 4-5; 58/240, 23 Dec. 2003, paras. 4-5; 57/141, 12 Dec. 2002, paras. 3-4; 56/12, 28 Nov. 2001, paras. 3-4; 55/7, 30 Oct. 2000, paras. 3-4; 54/31, 24 Nov. 1999, paras. 3-4; 53/32, 24 Nov. 1998, paras. 3-4; 52/26*, 26 Nov. 1997, para. 2; 51/34, 9 Dec. 1996, para. 2; 50/23, 5 Dec. 1995, para. 2; 49/28, 6 Dec. 1994, para. 2; all available at http://www.un.org/Depts/los/general_assembly/general_assembly_resolutions.htm

rights under the new regime invited a similarly vast expansion of the functions and capacity of PRC state agencies. It provided a comparatively legitimate framework through which to expand and "defend" the areas in which China could deploy its MLE fleet and effectively prohibit access to foreign users of maritime space. The economic, strategic, and political appeal of controlling more space is self-evident; the practical means of achieving it without triggering destabilizing conflict with other claimants is not so obvious. China's political elites recognized in UNCLOS norms a possibility to transform the state and its maritime environment in a gradual and sophisticated way – through creeping jurisdiction to effect closure.

From the standpoint of power, there is little wonder that China has not conformed its behavior to the treaty's provisions. Strict adherence to UNCLOS III would deny China desired sovereign rights and jurisdiction (and perhaps even sovereignty over non-island features) and weaken its position in its several urgent maritime disputes. We are left to consider why the PRC internalized so much of the Convention, and why it refers to UNCLOS as the legal basis for its implementation of its domestic law. The analogy of contract does little to resolve this puzzle, because there is no basic correspondence between the norms codified in the Convention and those internalized in PRC law and implemented in practice. Addressing them as a norms with subjective meaning and function in the contemporary PRC provides the analytical space for a more substantive reckoning with the transnational legal process in play; more specifically, it helps us ask how the EEZ regime enables a range of Chinese practices that are otherwise unaccountable.

This returns us to the broader concern with China's general attitude toward international law as an instrument of statecraft – one with a historical pedigree that imposes "unequal" restraints on

China and is therefore not yet well-adjusted to serve China's interests. In light of this, China has announced a clear intention to "vigorously participate in the formulation of international norms"[176] – to shape, through practice, the generally accepted norms and rules of international politics. A concluding Chapter takes up this question of influencing the global EEZ regime, focusing on how "rising power" gives rise to "creeping jurisdiction."

[176] Xinhua 2014: 中共中央关于全面推进依法治国若干重大问题的决定 [Decision of the CPC Central Committee Concerning Some Major Questions in Comprehensively Moving Governing the Country According to the Law Forward].

Conclusion

China's Law of the Sea: Summary and Future Prospects

> "The Sea, by the Law of Nature or Nations, is not common to all men, but capable of private Dominion or proprietie as well as the Land."
>
> - John Selden, *Mare Clausum: Of the Dominion, or Ownership, of the Sea* (1635)

> "We should enhance our capacity for exploiting marine resources, strengthen the marine economy, develop the marine economy, protect the marine ecological environment, resolutely safeguard China's maritime rights and interests, and build China into a maritime power"
>
> - PRC President Hu Jintao at 18th CCP National Congress (2012)[1]

This study explored China's evolving relationship to the law of the sea. The PRC's roiling maritime disputes with each of its littoral neighbors motivate the core question about how the law of the sea – especially as manifested in the EEZ regime created by UNCLOS III – bears on Chinese practices. This attention to the law of the sea follows from the observation that legal norms are the unique source of many of the basic parameters of these disputes. The EEZ, in particular, establishes the sovereign rights and jurisdictional competencies that define many of the substantive issues in dispute. It also radically extends the geographical scope of state authority extending out to sea from sovereign territory. In so doing, the EEZ generates entirely new overlapping zones of rights and jurisdiction and raises the economic and strategic stakes of long-standing sovereignty disputes over islands.

[1] Xinhua 2012b

China's distinctive mode of understanding and practically incorporating these new rights and jurisdiction has been the primary subject of empirical analysis. The overall finding is that these legal norms have enabled transformative changes to the state. Those changes entail new and explicit PRC interests in formal control over maritime space, with the law of the sea furnishing a viable instrument for China to realize those interests through *closure* of its claimed maritime zones, pursued in legal terms through creeping jurisdiction. These practices to augment China's legal authority – and correspondingly, diminish that of other users – hold potentially transformative implications for the regime itself. China exploits indeterminacy in the rules of the EEZ to advance a closed interpretation of the rights of other users of ocean space, challenging some of the underlying liberal norms of the law of the sea.

This strategy is possible in part due to the indeterminacy of law within the PRC party-state, which is drafted and implemented in a manner that assures its fundamentally inferior status to Party decisions about political priorities. This mode of "ruling the country through law" is at odds with expectations that China's integration into international legal institutions would bring about gradual liberalization. The case is an influential one that should occasion some circumspection about how well legalized norms function in a system with China as a major player. International law internalized and practiced in the manner observed in this case does not produce the various salutary effects usually attributed to legal rules and procedures agreed upon by sovereign states. Instead, the law of the sea presents a striking case of dysfunction in the international legal system, a new venue for international political discord and conflict rather than a solution to well-known problems of international cooperation.

This concluding Chapter will (I) summarize how the preceding chapters arrived at this judgment,

(II) analyze its implications for China's practice of international law moving forward, and (III) note certain limits and weaknesses of the project and suggesting potential extensions.

I. Summary of the study

The introductory chapter described the EEZ regime as both a radical expansion and dilution of state authority over the oceans. Narrow coastal bands of fully sovereign ocean space were for centuries the furthest extent of the state. Over the course of the second half of the twentieth century, the international community adjusted to technological, ecological, and economic change by codifying a legal regime affording something short of full sovereignty over the vast resources of an extensive new economic zone, comprising nearly 40% of the water space on the planet. This remarkable change in the boundaries of the sovereign state is seldom recognized in the international relations discipline, despite its evident bearing on geopolitics – not least in the contested waters of East Asia, where the EEZ is now front and center in a collection of heated disputes. Among other neglected elements of this story of the EEZ is China's role in its creation and its current position at the vanguard of a movement to enclose and effectively "territorialize" maritime space as an integral part of the state (Oxman 2006). Rather than treating this as a second-order feature of the conventional, territorial disputes in which China is engaged, this study recognizes that the "creeping" jurisdictional element is consequential and worthy of analysis in its own right.

After canvassing varied theoretical approaches to international law in international politics, I selected the transnational legal process approach championed by former U.S. State Department legal adviser Harold Koh. This theory's prescriptive account demonstrates how processes of interaction, interpretation and internalization may produce "obedience" – the state's routine,

willing compliance with international legal obligations. International norms eventually become a valued part of the state's practical repertoire. This bold prediction offers a stimulating contrast to observed PRC practices, which on balance challenge rather than adhere to the norms promoted by the EEZ regime.

The theory adopted to structure this study modifies the transnational legal process theory in four ways: (1) discarding the teleology of obedience, (2) introducing a process of implementation after internalization to examine the various alternatives to obedience, (3) recognizing that internalization processes in China are systematically different from those in liberal, rule of law polities, and (4) accounting for the implications of indeterminacy, particularly the wide berth it permits for political discretion in legal processes. The theory thus reconstructed challenges the validity of "transnational legal process" as a prescription for making illiberal states more liberal. It also isolates how China's Leninist political-legal system should give pause to any presumption of a productive role for lawyers, courts, civil society, and any other potential "norms entrepreneurs" operating in such an environment. These sub-state actors' preferences are entirely marginalized by the centralized political decision-making processes that organize PRC engagement with international law. Lacking an institutional milieu in which issues can be drawn out of the "zone of politics" and into the "zone of law," China is not a state in which transnational legal processes are likely to produce the desired normative outcome.

But China is not simply rejecting international law outright – i.e., "disobeying" – so much as it is taking interpretive liberties with liberal norms, practicing its legal obligations in line with its preferences, which themselves appear to be transformed by those norms in unanticipated ways. Such auto-interpretation is not so unusual and alerts us to a wealth of social science explanations

of the practical influence of international law. To develop these alternatives to obedience, I turn to international relations theories that privilege either power, contract, or norms as the primary explanation for the operation of international law in international politics. Power-based analysis treats law as an epiphenomenon, an analytically secondary manifestation of coercion of some kind such that law reflects the interests of powerful states. Contract approaches argue that the dominant effects of power can be channeled by mutual self-interest, and that states may consent to binding arrangements that effectively constrain their behavior. Norms-based accounts take a more sociological view of the international legal system as a social arena in which all actors operate, and which may over time transform those actors' identities and interests.

Applying these lenses to the basic empirical pattern of Chinese engagement with the law of the sea, I argue that the deductions demanded by the power and contract approach are ill-suited to the basic empirical patterns of the case. A view solely from power cannot account for the fact that the dominant powers in the system – the US and the USSR – fought vigorously against the establishment of a new law of the sea, and objected especially to the advent of an EEZ which would limit their existing advantages in a liberal, open system. The contract view explains some of the economic aspects of the regime, but fails in explaining why China would lobby vociferously for an inferior, even reduced, distribution of material gains; contract's presumptions of equilibrium further limit its methodological capacity to account for the sheer indeterminacy of some of the most important norms in the law of the sea. They are also ill-suited to a set of domestic institutions in China that tend to promote indeterminate rules. Compliance with the terms of the contract depends upon the agent's particular interpretation of compliance, and invites such a wide range of behavior as to rule out the utility of a strict contract approach. Further, each approach at least tacitly expects liberal norms to prevail: for power, because those

approximate the interests of the powerful states in the system; for contract, because liberal norms better approximate market rationality and efficiency.

Arguments from norms are not similarly hindered by falsifiable predictions; they just require reimagining for a study of "failed" socialization. Further adjustment is required to treat a set of norms with no particular ethical content, and which therefore function differently in social settings than liberal norms concerning political and civil rights, the typical focus of norms studies. Fortunately, because the various theories are not mutually exclusive, an approach that treats norms as the principle empirical object allows us to recognize that contract or power may indeed be operating in some measure. Norms shape actor interests such that their practices may be rendered as a function of actors' evaluations of which means and ends are appropriate and efficacious. Such evaluative choices can also be unlinked from purely instrumental rationality by positing some variation in actor identity: states' historical and institutional trajectories determine the ways they assess their own interests and the means appropriate to achieve them. For some, perhaps many, actors, international law and the norms it prescribes have no special legitimacy or appeal beyond their potential for instrumental use.

These theoretical positions intact, the study moves to analyze China's practice of the law of the sea in terms of the four *i* transnational legal processes: interaction, interpretation, internalization and implementation. In the interaction phase, the subject of Chapter 2, we examined the PRC's initial encounter with the EEZ regime. The PRC participated in negotiations and then ratified UNCLOS III despite enjoying few of the treaty's benefits and disproportionately bearing the treaty's costs. China's interaction at this rule-making forum is difficult to square with conventional accounts of why states commit to international legal treaties. We expect states –

great powers in particular – to prefer and advocate legal rules and norms consistent with their interests (however conceived); at a minimum, they will not consent to disadvantageous rules unless coerced to do so. Yet without plausible coercion, the PRC enthusiastically consented to various rules in UNCLOS III that impose obvious economic, political and strategic costs on China without corresponding benefits. This costly commitment is especially remarkable with regard to the rules governing the newly-formed EEZ, which PRC delegates ardently supported during the Conference. Analyzing the official records of Chinese positions and statements before, during and after the conference, we observed that the discrete Chinese preferences for the treaty were borrowed from those of the many Third World states participating in the negotiations. The broad statements of PRC delegates indicate that their preferences were secondary, and flowed from a more diffuse shared interest in revising an old regime that accrued to the benefit of "maritime hegemonists." They sought to do so by promoting an *illiberal* doctrine that functioned with *indeterminate* rules, and a core norm of enhanced control for the coastal state, i.e., *closure*.

Chapter 3 inquired into the cultural-institutional and historical bases for this Chinese interpretation, a necessary consideration to make sense of the interests Chinese delegates represented in UNCLOS III. Drawing on the Chinese tradition of law, the history of the unequal treaty system, and a set of experiences specific to the law of the sea that inclined the Chinese to view it as a potentially useful defensive instrument, this Chapter assessed the overall Chinese attitude toward international law. Situating it also in the context of the radical politics of the era, we can make sense of the Chinese move to ratify despite the disadvantages of the treaty. Those politics were marked by pronounced hostility to international law giving way to an explicitly instrumental view of how international law could serve "socialist modernization." Close analysis

of the way international law was taught and practiced in China during this important transitional period further sheds light on the distinctive interpretation Chinese leaders applied to the new law of the sea, and indicated some of the specific ways it should be practiced.

The rest of the analysis, in Chapters 4 and 5, treated the paired processes of internalization and implementation – that is, how the law of the sea was incorporated into China's domestic law and then put into practice. This question required a preliminary inquiry into legal institutions, rules, and procedures in the modern PRC, centering on the question of how they are organized to incorporate treaty law. Based on the formal rules laid out in the PRC constitution(s) and in relevant statutes and regulations, we can conclude that China's legal scheme does not necessitate the internalization of treaty obligations into domestic law. Any elements of a treaty that subsequently enter domestic law do so only because they have been selected and adapted according to ad hoc political preferences. Central authorities (especially political-legal cadres) in the CCP enjoy near-total authority about which treaty norms will enter domestic law and in what form. Lower-level bureaucratic and administrative actors then exercise considerable discretion over how those international legal norms will be put into practice. Given the relative weakness of the PRC's legal institutions and their susceptibility to political influence, the ill-defined concept of "maritime rights and interests" provided sufficient political motivation for a selective but far-reaching internalization of many of the norms of the nascent EEZ regime. Legal rights are readily affixed to political interests in a set of institutions that makes no special distinction between the "zone of law" and the "zone of politics."

The analysis then turned to the specific processes by which the EEZ regime itself manifested in PRC law and policy. These norms entered the Chinese system only after being interpreted and

drafted into laws, regulations and rules that promote a high degree of closure – state authority at the expense of international rights – in the disputed waters surrounding China. We observed a systematic move to expand the geographic scope and augment the substantive content of the norms undergirding the EEZ. This was accompanied by rather dramatic changes to the function of the state – especially its maritime law enforcement agencies and their supporting bureaucracy – which now had a far broader mission to establish Chinese rights and jurisdiction over a far larger swathe of maritime space than had ever before come under the state's authority. The transformative impact depended both on the quality of the norms themselves, and on the domestic political context in which they were received. In both cases, indeterminacy prevailed: the treaty admits of several more or less reasonable interpretations. This comports with the Chinese preference for using law as a flexible instrument of policy, with rules and regulations drafted indeterminately so as to afford political actors considerable (but not unlimited) discretion to construe the law as circumstances demand.

The upshot is that UNCLOS radically expanded China's claimed maritime jurisdiction into the EEZ, producing a large body of domestic law that puts the state to work in that new zone. The functional tasks assigned to state organs tend to exceed the rights assigned in the Convention, exploiting indeterminacy in the text of the treaty to claim broader and deeper authority, then granting broad discretionary authorities to implement EEZ rules according to political expedience. Highly salient and seemingly urgent demands arising from maritime disputes greatly amplify the political importance of enforcing these domestic laws in disputed zones. There are of course military and diplomatic components of this, but the establishment of PRC "administrative control" is of fundamental importance in China's South and East China Sea disputes. The necessity for "administrative control" in the EEZ, where none existed in the past, creates a range

of new responsibilities, among them "rights protection" missions for maritime law enforcement (MLE) agencies. These take the form of demonstrating presence, protecting Chinese commercial activities, and denying access to foreign users and militaries. These missions drive substantial resources toward the MLE fleet, personnel, and training. They have led to substantial enhancements of the bureaucratic status and political prestige of the principle state organs involved in implementing maritime policies. Several vignettes of recent episodes of international frictions arising from China's implementation of its domestic law helped illustrate the practical consequences of this political-legal system. In short, China's growing capacity (rising power) can be channeled through a domestic maritime legal scheme that does not constrain but rather prompts and enables its practical efforts to assert deeper and broader authority (creeping jurisdiction).

II. Implications for China's Future Practice

What does this analysis portend for China's future practice of the law of the sea? The processes observed are gradual, and though they should not be expected to proceed linearly, PRC jurisdiction seems likely to continue creep out into its near seas. The trend is toward ever more domestic Chinese law and law enforcement in disputed zones, effective to the degree Chinese power is properly organized to coerce or persuade other potential maritime users. This creeping jurisdiction towards closure is already in evidence, a far more consequential outcome than "delay" (Fravel 2008). It is possible that the underlying logic of the Fravel theory of escalation and cooperation still obtains – if, for example, China faced a significant security threat on its continental boundaries, it might well seek to compromise in the maritime domain. However, in the absence of such exogenous change, future practice will likely continue in this vein.

China's short-lived participation in modern transnational legal processes is changing endogenously, marked by growing knowledge and familiarity with the instrumental application of international law, and growing Chinese confidence as a military and economic power at regional and global levels. With respect to the law of the sea, we should consider the possibility that there is an implicit hierarchy in the PRC's maritime strategy, such that the indeterminate qualities of norms the state internalizes and promotes are only temporary means to the end of closure. It may even be that closure is only a temporary means to the end of security, and, if Chinese capabilities continue to grow, may yield to a more open set of preferences about the law of the sea. Illiberal interpretations of the law of the sea – and international law generally – seem unlikely to subside within a Chinese party-state so constituted, pace expectations of an irresistible liberalizing tide sweeping through China's political institutions on a wave of foreign capital and trade. China's practices seem certain continue to reflect its orientation toward state control at the expense of individual rights. As PRC practices externalize these norms into the maritime domain with growing confidence and capacity, they may become more widely accepted by other states that share China's orientation, are coerced to do so, or otherwise see some benefits in acquiescence.

Indeterminacy, while a characteristic of China's domestic law-making and manifest in certain aspects of the EEZ regime, may diminish if these illiberal preferences become the norm. China's "tributary" tradition of statecraft is premised on Confucian values that have been resuscitated in Beijing's rhetoric and diplomatic repertoire. Among those values were rather precise and determinate rules governing interstate relationships, prescribing specific practices ranging from the symbolically-weighted "kowtow" to elaborately codified standards for diplomatic protocol (Li 2004; Fairbank 1968). Order was formally established on hierarchic terms that were explicit

and prioritized stability – to the extent that China did not leverage its superior status to extract unequal distributional rewards (Kang 2007, 2010). Thus there is a historical basis for at least some wishful thinking that a relatively modest appetite for international conquest and overall preference for stability will characterize a more powerful China's conduct in its disputes. Perhaps perceptions of enhanced maritime security will incline PRC leaders to favor the compromises that prevailed in the settlement of China's land boundary disputes (Fravel 2008). The need for indeterminacy, and thus Chinese freedom of action in the "grey zones" of law, would be obviated if the customs of the region were to approximate China's preferences.

What are the prospects for China's preferences becoming the norm in the region, or beyond? The liberal triumphalism implied by Koh's reading of transnational legal process is not persuasive in the maritime domain, at a minimum. As China's practices diverge further from obedience to UNCLOS rules and become more potent, they will incline other states toward obedience to illiberal standards set by the PRC. For IR theorists inclined to similar beliefs about the transcendence of determinate, liberal norms, it is hard in 2016 to share Ikenberry's conviction that "[r]ival hegemonic states with revisionist and illiberal agendas have been pushed off the global stage."[2] China's agenda for regional maritime security, however revisionist and illiberal, is in no way marginalized by an UNCLOS treaty to which the United States is not even a party. There need not be an immediately viable alternative to the "Western liberal order" for the basic openness of that system to break down piecemeal. This process is already evident in the law of the sea regime, especially in the competing norms of closure that China champions in the EEZ. However robust and efficient the institutions of liberal order compared to the alternative, there is no obvious legal remedy for such dysfunction. The potential for radical transformation of the

[2] Ikenberry 2011a: 67

liberal order appears still greater as we enter an era marked by profoundly illiberal sentiments expressed by the people and leaders of even the supposed champions of global liberalism, the United States and the United Kingdom.

Looking across functional arenas, we might also look to China's performance in the World Trade Organization for insights into plausible developments on the maritime front. Here, again, there are grounds for cautious optimism. While China's degree of compliance remains a subject of controversy,[3] it is thoroughly integrated into the essentially liberal global trading regime. Chinese trade negotiators have made extensive use of its dispute settlement system, and have in some other contexts also shown openness to third-party dispute resolution (Akande 2010). If China is subverting the regime, it is only gradually through legitimate procedures within the institutional framework to which it has acceded.[4]

This study counsels a less sanguine attitude about China's participation in the transnational legal process, even in this domain of trade in which the absolute, mutual gains seem most likely to generate converging legal practices. China's "rising power" in global trade may be linked to creeping trends away from liberal commercial relations among states – perhaps to protect their intellectual property (Massey 2006) or to appease rising protectionist sentiments, as witnessed in 2016 in the United States and Britain. The U.S. Trade Representative's 2015 Annual Report to Congress on China's WTO Compliance notes that since 2012, China has "demonstrated a

[3] For a compelling early assessment of Chinese practice, see Clarke 2003. Subsequent analysis have highlighted the degree to which China's WTO "accession induced regulatory, institutional and normative changes that have transformed the landscape of trade and investment in China" (Qin 2007: 720), some of which are in line with the liberal norms of the complex trade regime and others of which reflect "selective adaptation" (Potter 2004). Other later analyses run the range from enthusiastic cheerleading for China's rigorous compliance with WTO dispute resolution (Zhang and Li 2013) to analysis of the various ways China shirks WTO responsibilities through extra-institutional "modes of resistance China deploys to avoid complying with basic WTO norms" (Webster 2014: 530).

[4] "Chinese foreign policy accepts that for the foreseeable future it will have to accommodate US hegemony, or when it must be challenged, it will do so mainly inside international institutions" (Johnston 2008: 208).

stronger embrace of state capitalism,"[5] and has buttressed it with domestic legal reforms that actually codify non-compliant practices (e.g., the implementing regulations flowing from its 2008 Anti-Monopoly Law). China's practice in the WTO is "mixed" at best,[6] demonstrating substantial transformation of the Chinese state to participate in the regime, and reciprocally, substantial transformation of the global trading regime to accommodate China. In the absence of steadfast Western support for ever-greater liberalization of that regime, China's is poised to wield ever-greater transformative influence.

What are the implications for China's practice in the law of the sea? Growing comfort and familiarity operating in and around international legal institutions may breed contempt. Even if abrogation of treaty commitments appears unlikely, there are many ways these institutions may decay – or, rather, evolve in unexpected ways less favored by the liberal west. Evidence and logic support a less dramatic, if perhaps obvious, expectation: China will exercise greater influence in shaping international norms. The prevailing liberal character of norms in the trade or oceans domain are not immune from the influence of a powerful, purposive actor able to make coercive or persuasive appeals to other actors who may share, or at least not ideologically reject, their illiberal values.

A potential silver lining for liberal crusaders is that some liberal norms may become more appealing if China's power continues to wax. A stronger position in global markets could skew China's economic preferences towards greater openness. All things being equal, relatively deregulated market access and non-discriminatory trade rules favor the actor with more capital

[5] U.S. Trade Representative 2015: 3

[6] This is also the net assessment of an influential earlier study of China's participation in the international legal system (Feinerman 1995). It is an analytically unsatisfying conclusion, but empirically robust: the scale and complexity of Chinese practices resist easy characterization in virtually every domain of legal practice.

and a larger market. Similarly, in the oceans domain, a "blue water" Chinese navy able to operate effectively out of area would, in theory, lead PRC leaders to favor a more liberal, open regime that would afford it ready access to littoral regions where it could project power, protect investments, secure its vital commercial and strategic sea-lanes, and show the flag. Many Chinese naval strategists already express a desire for ready access to distant straits and foreign EEZs;[7] in fact, the PLAN operates openly in foreign EEZs, despite its principled arguments against such practices when they are conducted by the United States Navy in PRC-claimed EEZs (U.S. Department of Defense 2015, Erickson and de la Bruyere 2014).

Even if we anticipate that China's "rising power" in terms of its naval and commercial enterprise lends itself to more open preferences, would this likely apply also in its "near seas" in East Asia? One fundamental element of liberal norms is their universality. Individual rights apply across time and space without discrimination, or so the classical theory goes. Is this ordering principle plausible in a region dominated by China? "An open region is one that is free of the irresistible gravitational pull of any one power…. One in which regional states are free to pursue their economic and political interests and are not bound to accede to the demands of their strongest neighbor."[8] By contrast, a closed region would be one in which Chinese rights are superior to those of other states. Without the liberal conviction that rights are universal and uniformly distributed, there is no necessary contradiction for China to pursue openness globally but closure in its own region. The balance of user and coastal state rights may be calibrated ad hoc, with substantial discretion for the actor wielding the most political leverage – an externalization of the Chinese mode of domestic governance into the pattern of regional relations. Evidence from the

[7] Author discussions with PLAN officers in the sidelines of conferences (Beijing, June 2014 and September 2014). This is an increasingly common sentiment expressed to me by think-tankers and academics in China, though no public comments or publications advance this argument explicitly.
[8] Dutton 2016: 7

case of China and the law of the sea indicates the "progressive development" of a more closed, rather than more open, regional order in East Asia.

III. Unanswered Questions and Potential Extensions

By tracing China's relationship to the EEZ through four transnational legal processes – interaction, interpretation, internalization, and implementation – this analysis sought to demonstrate the transformative influence of international law on China, and indicated China's potentially transformative influence on international law. The study lacks sufficient evidence to clinch the latter claim that China's practices feed back into the EEZ regime itself to the extent that they have demonstrably changed the underlying norms that shape the practices of other states. Still, short of that, there remain reasons to argue that Chinese practices alone are sufficient to promote a kind of dysfunction in international law, in which lack of agreement on the rules, and unwillingness to submit to legal procedures and remedies, produces conflict rather than cooperation. The notion of international law-as-contract presumes some basic compatibility among the political-legal systems states party to an agreement; it requires common knowledge in the form of at last rough equivalence between how its terms are interpreted.

A full treatment of the more sweeping possibility of regional or global norm-transformation would require a far broader comparative effort to assess not only China's practices, but those of the many other users of disputed maritime space in which China's practices are assumed to play an important normative role. Such analysis would also require more attention to be paid not only to the paramilitary elements of Chinese practice, but its growing military capabilities and presence – which after all, constitute the bulk of its state activity and investment in securing maritime closure. The "rising power" component, taken largely as a given, would be far more

persuasive if illustrated with practical demonstrations of China's effective capacity to control maritime space and its correlation with practical efforts to do so – that is, by clinching the direct, practical connection between China's expanding maritime "interests," based on its political goals, and the growing commitment to asserting and defending its maritime "rights," grounded in legal norms that exist largely independent of China.

The Philippines' Arbitration as a Critical Test

On the first issue – the lack of a comparative evaluation of other states' practices – a partial corrective may be applied through a case study of the recently concluded Philippines' UNCLOS Annex VII arbitration against the PRC. A short discussion of this important episode in China's relationship to the law of the sea here will suffice to demonstrate how analysis of the arbitral award could extend and strengthen the study – and perhaps even test some of its conclusions in the crucible of an international legal "outcome" that could determine some of the indeterminate aspects of UNCLOS III that the PRC had seen fit to exploit.

As noted in Chapter 2, the PRC delegation expressed strong objections to the compulsory dispute resolution mechanisms of the treaty during its negotiation, later attempting to issue a "reservation" on the treaty barring the application of such procedures. They expressly reserved the right to adopt a preferred dispute resolution method of "negotiation and consultation" – this despite the fact that the treaty bars reservations and imposes a mandatory, third-party dispute resolution system to resolve issues of interpretation and application of UNCLOS III. Already, we see China's defection from the supposed contract and the assertion that China's preferred norms must prevail in practice. Exclusion of third-party arbitration and adjudication allows the legal process to remain constrained by the political decisions of Chinese leaderships – the inverse of

the much-desired legal constraint on politics that lawyers and contract-oriented IR scholars promote. PRC contributions to the interaction in forging the convention were insufficient to render the dispute resolution regime toothless. While that preference was not honored in the treaty, the PRC interpreted away the binding and compulsory nature of dispute resolution mechanisms. China's interpretation of its obligations under this particular arbitration process does not bode well for subsequent internalization and implementation of the arbitral award.

Judgment on internalization and implementation will have to await a sufficient volume of practice related to the arbitral award to accumulate as evidence. Still, even at this early stage, we have some substance for analysis in China's unequivocal and shrill rejection of the legitimacy of the arbitration procedure and frequently repeated pledge not to recognize or implement the award. Full reckoning with the implications of this award requires analysis of the parties' implementation of the award; China need not formally accept its normative validity in order to be influenced by the judgment rendered in the award.

Aspects of the award concerning the EEZ that will bear especially close consideration are: the determination that none of China's claimed territories in the Spratly Islands support human habitation or economic life of their own (UNCLOS III, Article 121[3]) and thus do not rate EEZs or continental shelves; the determination that the "9-dashed line" does not grant China any sovereign rights or jurisdiction, historic or otherwise, because they were extinguished by the advent of the EEZ regime; and the determination that a variety of Chinese actions in the EEZ were contrary to established norms for marine environmental protection. This study's findings suggest that China will persist in decoupling its practices from those prescribed in UNCLOS, while seeking to promote its practices as in conformity with its interpretation of the regime.

Sustained observation will allow the thesis to be tested and, if necessary, revised.

A Non-Unitary Actor?

One factor that may aid this analysis is a further disaggregation of the state. The actors who will "obey" or disobey or transform the norms of the EEZ in (not) implementing the arbitral award are not necessarily the central political-military leaders of the party-state in Beijing. While the study has established a sound basis for understanding their decisions vis-à-vis the EEZ as deliberate and strategic, the indeterminacy characteristic of China's political-legal system ensures significant scope for variation further from the center. One upshot of this indeterminacy and the generally weak legal institutions is a lack of capacity to directly and effectively issue commands to local actors; except in areas of highest priority, these cadres and apparatchiks are charged with interpreting often vague policy demands and adapting them for local implementation. Even in diminishing the expected role of "norms entrepreneurs," lawyers, judges, and others in a typical transnational legal process, this research has gestured towards the non-trivial role of actors at lower levels – whether bureaucrats, coast guard officers, fishermen, legal scholars. Practice is the central object, and these actors are ultimately the ones charged with practical implementation.

Attitudes toward international law are by no means distributed uniformly across China. While there is a remarkable degree of conformity in public pronouncements, and a great deal of homogeneity induced by standardized (and highly politicized) educational policies, my experiences interacting with a small slice of the international law community indicate quite a wide range of views on the function of the law of the sea in China's disputes. In the current political climate, voices dissenting from policy (or unwilling to quickly adjust to new policy) are

severely marginalized and may remain so indefinitely. Nonetheless, we may yet find interesting variation between the practices of diplomats in Beijing whose priority is low-key stability and those of provincial leaders in, say, Hainan province who are likely to profit most directly from enhanced resource development in disputed zones. The signals these more local actors send to the actors operating in disputed zones to fish or exploit oil and gas or enforce domestic law may be at odds with central directives.

In the case of the arbitral award, there are a few important indicators of the extent to which the center will completely dictate PRC practices. Patriotic Chinese fishermen, seized of the notion that the Scarborough Shoal (黄岩岛) is China's "sacred" and "ancient" traditional fishing ground, may resist Beijing's efforts to strike a compromise with the Philippines, a process already underway. The perception or reality of strong support from the well-resourced and motivated China Coast Guard may amplify this tendency. PLA Navy officers unremittingly hostile to the idea that any international legal decision can infringe upon their strategic prerogatives may also resist in a variety of ways, though likely not on the water's surface. Elite political leaders in Beijing may not themselves be in full accord, despite the norm of consensus-based decision-making, and the policies adopted may be unsatisfactory or contradictory as a result. Assuming the persistence of strong and assertive leadership from Xi Jinping, these lower-level variations may not emerge as dominant patterns, but should be considered when interpreting variations in observed practices. In any event, it is imperative to resist the trap of reifying China as a unitary actor; even where central authority appears to be the dominant force in policy, as in this case, assuming its full coherence throughout the implementation process is unwise.

Formation of Regional Custom?

More sweepingly, the clarity and precision of the ruling against China starkly poses the question of whether or not Chinese practice is sufficient to alter the norms as currently practiced by most states. The express Chinese intention to overwhelm those existing norms with persistent objection to disadvantageous elements and diligent practice of its own interpretations of those norms confronts a major jurisprudential obstacle: customary norms do not necessarily adjust to the "new normal" where other states do not recognize that behavior as lawful. As the ICJ ruled in its *Nicaragua v. United States* award, "[the court] does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule...the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule."[9] The ruling confirms that powerful states cannot transform customary law by individual practice alone. The judgment was ignored by the United States, which withdrew its acceptance of the ICJ's jurisdiction prior to the decision and set an unfortunate precedent for China. In that case, as perhaps in the present one involving China, one powerful state's defection may not be enough to meaningfully influence the content of a customary rule.

This subject of change and development in customary international law lies well beyond the scope of this study. However, it bears brief remark because if Chinese practices are to be valid under international law, such a legal transformation is the only logical alternative to a formal amendment to UNCLOS III. In delivering an authoritative decision on the "interpretation and application" of the law of the sea, in line with the treaty's mandate (UNCLOS III, Article 279), the arbitral award ruled out the possibility that substantial parts of Chinese claims may be

[9] International Court of Justice 1986: para. 186

chalked up to indeterminacy in the Convention. Custom is a live arena of debate in international legal scholarship, the subject of an ongoing International Law Commission investigation into the very "identification of customary international law," which must precede judgment about its proper application.[10] For present purposes, suffice it to say that customary international law remains susceptible to purposive application of political power, even if the jurisprudence is not fully developed. States capable of establishing a behavioral norm and unilaterally enforcing it, as China arguably is becoming in the South and East China Seas, may have a creditable claim to be the author of new (or at least "special" or "regional") customary norms. In the case at hand, the behavioral norm will be in tension with an authoritative decision of an international court. This is a case whose development bears close scrutiny by international law and international relations scholars, and will occupy my attention in extending and broadening this study in the future.

Implications of Growing Maritime Capability

That capacity to sustain and enforce a "new normal," at least for rights and jurisdiction in disputed maritime space of East Asia, will depend in large part on China's military capabilities, a second of the major lacunae in this study. These capabilities, no doubt, will play a critical role in shaping the practice of other states operating in this space. Observation of the patterns of Chinese naval operations in its own and others' EEZs will provide a longer-term test of the argument from power that international law does not meaningfully constrain strong states. It may be that the use of international law as a "defensive weapon," or instrument of closure to deny or limit foreign access, is a temporally limited campaign. With sufficient "anti-access, area denial" capabilities, the legal niceties may fall by the wayside in Chinese diplomacy – especially if

[10] See International Law Commission "Identification of Customary International Law" website, including the several reports and ongoing studies on the subject http://legal.un.org/ilc/guide/1_13.shtml

further arbitrations or other authoritative judgments on the law of the sea place China's conduct further and further outside the bounds of international law.

One interesting tension that hints at such a development is the steadily growing activity of the PLAN fleet in foreign EEZs. These activities are occurring not just in disputed zones that are at least plausibly part of China's own EEZ, but in undisputed EEZs administered by Japan and the United States. The indeterminacy of China's own domestic law on this subject merely grants law enforcement agencies the discretion to declare foreign activities in Chinese EEZs as damaging to China's security interests and thus illegal (see Chapter 5); there is no specific legal prohibition on the activity, preserving the flexibility for Chinese actors to interpret that law to adjust to political circumstances. At any rate, it seems likely that the PLAN would be dismissive of any domestic law that purported to regulate their freedom of action in domains they deem important to China's broader security.[11] These operational patterns bear continued observation and would serve as a worthy empirical extension of the narrower legal analysis undertaken in this study.

Indeed, this study focuses only on the legal dimension of what must be reckoned as a far broader and more comprehensive effort to secure control of the territory and maritime space along China's vulnerable coast. "Creeping jurisdiction" is only the observable, legal manifestation of this political campaign. Now that the once-backward PLAN is capable of operating in the disputed zones and reinforced by substantial power-projection capabilities from the coast, the legal element – arguably always peripheral – may diminish as a focus of Chinese diplomacy.

Whatever its legal status, closure would be the basic norm of a Chinese-dominated western

[11] Author interview with PLAN legal specialist at Beijing University of Politics and Law (March 2015); the interviewee argued vociferously that the few lawyers in the PLAN felt that domestic maritime law "totally unnecessary."

Pacific. The openness preferred by European and then American navies is a characteristic of a liberal, maritime order that requires sustained enforcement to remain effective. That is a system in which illiberal, continental-minded Chinese strategists consider their nation to be at a permanent disadvantage. With military capabilities to enforce legal claims to the space along their vulnerable littoral, China may redefine that space as more of a continental zone, an extension of the boundaries of the sovereign state in which foreign users enjoy only limited rights of transit and trade. Put at risk by Chinese submarine, missile, and robust air and surface warfare capabilities (aided by the establishment of PRC military facilities on disputed Spratly features), foreign military users' access could steadily erode. The economic and strategic consequences of this remain purely speculative (some suggest a Chinese "sphere of influence"); less speculation is required to predict the fate of "Western" international law in a space where Western power is effectively excluded. The law of the sea would remain, but bearing the illiberal, indeterminate mark of China's politically-dominated legal institutions, now operating at scale throughout the region. Chinese practices of international law bear the imprint of their domestic legal institutions, which we might reasonably expect to be externalized to the governance of the broader region.

International Law With Chinese Characteristics

Whatever the longer-term implications for regional order, and whatever our normative views on the desirability of a Sinic substitute for the familiar Anglo-American system, there is significant contemporary demand for original research and analysis on how China understands and practices international law in the maritime domain. All stakeholders (and especially the United States)

publicly agree that the disputes must be handled according to international law,[12] but there is little agreement on what that means in theory or practice. For the US, "[i]nternational law, not power or an ambiguous sense of historical entitlement, should be the basis of making and enforcing maritime claims."[13] Historical entitlement looms large in the Chinese interpretation of the law of the sea and broader worldview; these two attitudes are not easily reconciled.

The Chinese voice of dissent on what "the rules" are and how they must be applied is unmistakable. Hopeful estimates of China's willingness to "obey" international law during its period of reform and opening are giving way to the reality of a more disruptive stage in the PRC's relationship to the international legal system, one in which China is less constrained by international norms and rules and more engaged in transforming them in its image. The influence of China's rising power in contemporary international relations is evident in its evolving attitudes toward and practice of international law. China's "creeping jurisdiction" bears further study as a leading indicator of this process.

[12] In July 2010, Secretary of State Hillary Clinton told an ASEAN Regional forum meeting in Hanoi, "the United States, like every nation, has a national interest in freedom of navigation, open access to Asia's maritime commons, and respect for international law in the South China Sea," (http://www.state.gov/secretary/rm/2010/07/145095.htm). Since then, U.S. leaders including the President have voiced strong support for peaceful resolution of disputes through international legal mechanisms as a main pillar of U.S. foreign policy in the region.
[13] Fuchs 2014

PART V

EXCLUSIVE ECONOMIC ZONE

Article55

Specific legal regime of the exclusive economic zone

The exclusive economic zone is an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in this Part, under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention.

Article56

Rights, jurisdiction and duties of the coastal State in the exclusive economic zone

1. In the exclusive economic zone, the coastal State has:

(a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds;

(b) jurisdiction as provided for in the relevant provisions of this Convention with regard to:

(i) the establishment and use of artificial islands, installations and structures;

(ii) marine scientific research;

(iii) the protection and preservation of the marine environment;

(c) other rights and duties provided for in this Convention.

2. In exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention.

3. The rights set out in this article with respect to the seabed and subsoil shall be exercised in accordance with Part VI.

Article57

Breadth of the exclusive economic zone

The exclusive economic zone shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.

Article58

Rights and duties of other States in the exclusive economic zone

1. In the exclusive economic zone, all States, whether coastal or land-locked, enjoy, subject to the relevant provisions of this Convention, the freedoms referred to in article 87 of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention.

2. Articles 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part.

3. In exercising their rights and performing their duties under this Convention in the exclusive economic zone, States shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law in so far as they are not incompatible with this Part.

Article59

Basis for the resolution of conflicts

regarding the attribution of rights and jurisdiction

in the exclusive economic zone

In cases where this Convention does not attribute rights or jurisdiction to the coastal State or to other States within the exclusive economic zone, and a conflict arises between the interests of the coastal State and any other State or States, the conflict should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole.

Article60

Artificial islands, installations and structures

in the exclusive economic zone

1. In the exclusive economic zone, the coastal State shall have the exclusive right to construct and to authorize and regulate the construction, operation and use of:

(a) artificial islands;

(b) installations and structures for the purposes provided for in article 56 and other economic purposes;

(c) installations and structures which may interfere with the exercise of the rights of the coastal State in the zone.

2. The coastal State shall have exclusive jurisdiction over such artificial islands, installations and structures, including jurisdiction with regard to customs, fiscal, health, safety and immigration laws and regulations.

3. Due notice must be given of the construction of such artificial islands, installations or structures, and permanent means for giving warning of their presence must be maintained. Any installations or structures which are abandoned or disused shall be removed to ensure safety of navigation, taking into account any generally accepted international standards established in this regard by the competent international organization. Such removal shall also have due regard to fishing, the protection of the marine environment and the rights and duties of other States. Appropriate publicity

shall be given to the depth, position and dimensions of any installations or structures not entirely removed.

4. The coastal State may, where necessary, establish reasonable safety zones around such artificial islands, installations and structures in which it may take appropriate measures to ensure the safety both of navigation and of the artificial islands, installations and structures.

5. The breadth of the safety zones shall be determined by the coastal State, taking into account applicable international standards. Such zones shall be designed to ensure that they are reasonably related to the nature and function of the artificial islands, installations or structures, and shall not exceed a distance of 500 metres around them, measured from each point of their outer edge, except as authorized by generally accepted international standards or as recommended by the competent international organization. Due notice shall be given of the extent of safety zones.

6. All ships must respect these safety zones and shall comply with generally accepted international standards regarding navigation in the vicinity of artificial islands, installations, structures and safety zones.

7. Artificial islands, installations and structures and the safety zones around them may not be established where interference may be caused to the use of recognized sea lanes essential to international navigation.

8. Artificial islands, installations and structures do not possess the status of islands. They have no territorial sea of their own, and their presence does not affect the delimitation of the territorial sea, the exclusive economic zone or the continental shelf.

Article61

Conservation of the living resources

1. The coastal State shall determine the allowable catch of the living resources in its exclusive economic zone.

2. The coastal State, taking into account the best scientific evidence available to it, shall ensure through proper conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not endangered by over-exploitation. As appropriate, the coastal State and competent international organizations, whether subregional, regional or global, shall cooperate to this end.

3. Such measures shall also be designed to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield, as qualified by relevant environmental and economic factors, including the economic needs of coastal fishing communities and the special requirements of developing States, and taking into account fishing patterns, the interdependence of stocks and any generally recommended international minimum standards, whether subregional, regional or global.

4. In taking such measures the coastal State shall take into consideration the effects on species associated with or dependent upon harvested species with a view to maintaining or restoring populations of such associated or dependent species above levels at which their reproduction may become seriously threatened.

5. Available scientific information, catch and fishing effort statistics, and other data relevant to the conservation of fish stocks shall be contributed and exchanged on a regular basis through competent international organizations, whether subregional, regional or global, where appropriate and with participation by all States concerned, including States whose nationals are allowed to fish in the exclusive economic zone.

Article62

Utilization of the living resources

1. The coastal State shall promote the objective of optimum utilization of the living resources in the exclusive economic zone without prejudice to article 61.

2. The coastal State shall determine its capacity to harvest the living resources of the exclusive economic zone. Where the coastal State does not have the capacity to harvest the entire allowable catch, it shall, through agreements or other arrangements and pursuant to the terms, conditions, laws and regulations referred to in paragraph 4, give other States access to the surplus of the allowable catch, having particular regard to the provisions of articles 69 and 70, especially in relation to the developing States mentioned therein.

3. In giving access to other States to its exclusive economic zone under this article, the coastal State shall take into account all relevant factors, including, *inter alia*, the significance of the living resources of the area to the economy of the coastal State concerned and its other national interests, the provisions of articles 69 and 70, the requirements of developing States in the subregion or region in harvesting part of the surplus and the need to minimize economic dislocation in States whose nationals have

habitually fished in the zone or which have made substantial efforts in research and identification of stocks.

4. Nationals of other States fishing in the exclusive economic zone shall comply with the conservation measures and with the other terms and conditions established in the laws and regulations of the coastal State. These laws and regulations shall be consistent with this Convention and may relate, *inter alia*, to the following:

(a) licensing of fishermen, fishing vessels and equipment, including payment of fees and other forms of remuneration, which, in the case of developing coastal States, may consist of adequate compensation in the field of financing, equipment and technology relating to the fishing industry;

(b) determining the species which may be caught, and fixing quotas of catch, whether in relation to particular stocks or groups of stocks or catch per vessel over a period of time or to the catch by nationals of any State during a specified period;

(c) regulating seasons and areas of fishing, the types, sizes and amount of gear, and the types, sizes and number of fishing vessels that may be used;

(d) fixing the age and size of fish and other species that may be caught;

(e) specifying information required of fishing vessels, including catch and effort statistics and vessel position reports;

(f) requiring, under the authorization and control of the coastal State, the conduct of specified fisheries research programmes and regulating the conduct of such research, including the sampling of catches, disposition of samples and reporting of associated scientific data;

(g) the placing of observers or trainees on board such vessels by the coastal State;

(h) the landing of all or any part of the catch by such vessels in the ports of the coastal State;

(i) terms and conditions relating to joint ventures or other cooperative arrangements;

(j) requirements for the training of personnel and the transfer of fisheries technology, including enhancement of the coastal State's capability of undertaking fisheries research;

(k) enforcement procedures.

5. Coastal States shall give due notice of conservation and management laws and regulations.

Article63

Stocks occurring within the exclusive economic zones of

two or more coastal States or both within the exclusive economic zone

and in an area beyond and adjacent to it

1. Where the same stock or stocks of associated species occur within the exclusive economic zones of two or more coastal States, these States shall seek, either directly or through appropriate subregional or regional organizations, to agree upon the measures necessary to coordinate and ensure the conservation and development of such stocks without prejudice to the other provisions of this Part.

2. Where the same stock or stocks of associated species occur both within the exclusive economic zone and in an area beyond and adjacent to the zone, the coastal State and the States fishing for such stocks in the adjacent area shall seek, either directly or through appropriate subregional or regional organizations, to agree upon the measures necessary for the conservation of these stocks in the adjacent area.

Article64

Highly migratory species

1. The coastal State and other States whose nationals fish in the region for the highly migratory species listed in Annex I shall cooperate directly or through appropriate international organizations with a view to ensuring conservation and promoting the

objective of optimum utilization of such species throughout the region, both within and beyond the exclusive economic zone. In regions for which no appropriate international organization exists, the coastal State and other States whose nationals harvest these species in the region shall cooperate to establish such an organization and participate in its work.

2. The provisions of paragraph 1 apply in addition to the other provisions of this Part.

Article65

Marine mammals

Nothing in this Part restricts the right of a coastal State or the competence of an international organization, as appropriate, to prohibit, limit or regulate the exploitation of marine mammals more strictly than provided for in this Part. States shall cooperate with a view to the conservation of marine mammals and in the case of cetaceans shall in particular work through the appropriate international organizations for their conservation, management and study.

Article66

Anadromous stocks

1. States in whose rivers anadromous stocks originate shall have the primary interest in and responsibility for such stocks.

2. The State of origin of anadromous stocks shall ensure their conservation by the establishment of appropriate regulatory measures for fishing in all waters landward of the outer limits of its exclusive economic zone and for fishing provided for in paragraph 3(b). The State of origin may, after consultations with the other States referred to in paragraphs 3 and 4 fishing these stocks, establish total allowable catches for stocks originating in its rivers.

3. (a) Fisheries for anadromous stocks shall be conducted only in waters landward of the outer limits of exclusive economic zones, except in cases where this provision would result in economic dislocation for a State other than the State of origin. With respect to such fishing beyond the outer limits of the exclusive economic

zone, States concerned shall maintain consultations with a view to achieving agreement on terms and conditions of such fishing giving due regard to the conservation requirements and the needs of the State of origin in respect of these stocks.

(b) The State of origin shall cooperate in minimizing economic dislocation in such other States fishing these stocks, taking into account the normal catch and the mode of operations of such States, and all the areas in which such fishing has occurred.

(c) States referred to in subparagraph (b), participating by agreement with the State of origin in measures to renew anadromous stocks, particularly by expenditures for that purpose, shall be given special consideration by the State of origin in the harvesting of stocks originating in its rivers.

(d) Enforcement of regulations regarding anadromous stocks beyond the exclusive economic zone shall be by agreement between the State of origin and the other States concerned.

4. In cases where anadromous stocks migrate into or through the waters landward of the outer limits of the exclusive economic zone of a State other than the State of origin, such State shall cooperate with the State of origin with regard to the conservation and management of such stocks.

5. The State of origin of anadromous stocks and other States fishing these stocks shall make arrangements for the implementation of the provisions of this article, where appropriate, through regional organizations.

Article67

Catadromous species

1. A coastal State in whose waters catadromous species spend the greater part of their life cycle shall have responsibility for the management of these species and shall ensure the ingress and egress of migrating fish.

2. Harvesting of catadromous species shall be conducted only in waters landward of the outer limits of exclusive economic zones. When conducted in exclusive economic

zones, harvesting shall be subject to this article and the other provisions of this Convention concerning fishing in these zones.

3. In cases where catadromous fish migrate through the exclusive economic zone of another State, whether as juvenile or maturing fish, the management, including harvesting, of such fish shall be regulated by agreement between the State mentioned in paragraph 1 and the other State concerned. Such agreement shall ensure the rational management of the species and take into account the responsibilities of the State mentioned in paragraph 1 for the maintenance of these species.

Article68

Sedentary species

This Part does not apply to sedentary species as defined in article 77, paragraph 4.

Article69

Right of land-locked States

1. Land-locked States shall have the right to participate, on an equitable basis, in the exploitation of an appropriate part of the surplus of the living resources of the exclusive economic zones of coastal States of the same subregion or region, taking into account the relevant economic and geographical circumstances of all the States concerned and in conformity with the provisions of this article and of articles 61 and 62.

2. The terms and modalities of such participation shall be established by the States concerned through bilateral, subregional or regional agreements taking into account, *inter alia*:

(a) the need to avoid effects detrimental to fishing communities or fishing industries of the coastal State;

(b) the extent to which the land-locked State, in accordance with the provisions of this article, is participating or is entitled to participate under existing bilateral, subregional or regional

agreements in the exploitation of living resources of the exclusive economic zones of other coastal States;

(c) the extent to which other land-locked States and geographically disadvantaged States are participating in the exploitation of the living resources of the exclusive economic zone of the coastal State and the consequent need to avoid a particular burden for any single coastal State or a part of it;

(d) the nutritional needs of the populations of the respective States.

3. When the harvesting capacity of a coastal State approaches a point which would enable it to harvest the entire allowable catch of the living resources in its exclusive economic zone, the coastal State and other States concerned shall cooperate in the establishment of equitable arrangements on a bilateral, subregional or regional basis to allow for participation of developing land-locked States of the same subregion or region in the exploitation of the living resources of the exclusive economic zones of coastal States of the subregion or region, as may be appropriate in the circumstances and on terms satisfactory to all parties. In the implementation of this provision the factors mentioned in paragraph 2 shall also be taken into account.

4. Developed land-locked States shall, under the provisions of this article, be entitled to participate in the exploitation of living resources only in the exclusive economic zones of developed coastal States of the same subregion or region having regard to the extent to which the coastal State, in giving access to other States to the living resources of its exclusive economic zone, has taken into account the need to minimize detrimental effects on fishing communities and economic dislocation in States whose nationals have habitually fished in the zone.

5. The above provisions are without prejudice to arrangements agreed upon in subregions or regions where the coastal States may grant to land-locked States of the same subregion or region equal or preferential rights for the exploitation of the living resources in the exclusive economic zones.

Article70

Right of geographically disadvantaged States

1. Geographically disadvantaged States shall have the right to participate, on an equitable basis, in the exploitation of an appropriate part of the surplus of the living resources of the exclusive economic zones of coastal States of the same subregion or region, taking into account the relevant economic and geographical circumstances of all the States concerned and in conformity with the provisions of this article and of articles 61 and 62.

2. For the purposes of this Part, "geographically disadvantaged States" means coastal States, including States bordering enclosed or semi-enclosed seas, whose geographical situation makes them dependent upon the exploitation of the living resources of the exclusive economic zones of other States in the subregion or region for adequate supplies of fish for the nutritional purposes of their populations or parts thereof, and coastal States which can claim no exclusive economic zones of their own.

3. The terms and modalities of such participation shall be established by the States concerned through bilateral, subregional or regional agreements taking into account, *inter alia*:

(a) the need to avoid effects detrimental to fishing communities or fishing industries of the coastal State;

(b) the extent to which the geographically disadvantaged State, in accordance with the provisions of this article, is participating or is entitled to participate under existing bilateral, subregional or regional agreements in the exploitation of living resources of the exclusive economic zones of other coastal States;

(c) the extent to which other geographically disadvantaged States and land-locked States are participating in the exploitation of the living resources of the exclusive economic zone of the coastal State and the consequent need to avoid a particular burden for any single coastal State or a part of it;

(d) the nutritional needs of the populations of the respective States.

4. When the harvesting capacity of a coastal State approaches a point which would enable it to harvest the entire allowable catch of the living resources in its exclusive economic zone, the coastal State and other States concerned shall cooperate in the establishment of equitable arrangements on a bilateral, subregional or regional basis to allow for participation of developing geographically disadvantaged States of the same subregion or region in the exploitation of the living resources of the exclusive

economic zones of coastal States of the subregion or region, as may be appropriate in the circumstances and on terms satisfactory to all parties. In the implementation of this provision the factors mentioned in paragraph 3 shall also be taken into account.

5. Developed geographically disadvantaged States shall, under the provisions of this article, be entitled to participate in the exploitation of living resources only in the exclusive economic zones of developed coastal States of the same subregion or region having regard to the extent to which the coastal State, in giving access to other States to the living resources of its exclusive economic zone, has taken into account the need to minimize detrimental effects on fishing communities and economic dislocation in States whose nationals have habitually fished in the zone.

6. The above provisions are without prejudice to arrangements agreed upon in subregions or regions where the coastal States may grant to geographically disadvantaged States of the same subregion or region equal or preferential rights for the exploitation of the living resources in the exclusive economic zones.

Article71

Non-applicability of articles 69 and 70

The provisions of articles 69 and 70 do not apply in the case of a coastal State whose economy is overwhelmingly dependent on the exploitation of the living resources of its exclusive economic zone.

Article72

Restrictions on transfer of rights

1. Rights provided under articles 69 and 70 to exploit living resources shall not be directly or indirectly transferred to third States or their nationals by lease or licence, by establishing joint ventures or in any other manner which has the effect of such transfer unless otherwise agreed by the States concerned.

2. The foregoing provision does not preclude the States concerned from obtaining technical or financial assistance from third States or international organizations in order to facilitate the exercise of the rights pursuant to articles 69 and 70, provided that it does not have the effect referred to in paragraph 1.

Article73

Enforcement of laws and regulations of the coastal State

1. The coastal State may, in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone, take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with this Convention.

2. Arrested vessels and their crews shall be promptly released upon the posting of reasonable bond or other security.

3. Coastal State penalties for violations of fisheries laws and regulations in the exclusive economic zone may not include imprisonment, in the absence of agreements to the contrary by the States concerned, or any other form of corporal punishment.

4. In cases of arrest or detention of foreign vessels the coastal State shall promptly notify the flag State, through appropriate channels, of the action taken and of any penalties subsequently imposed.

Article74

Delimitation of the exclusive economic zone

between States with opposite or adjacent coasts

1. The delimitation of the exclusive economic zone between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.

2. If no agreement can be reached within a reasonable period of time, the States concerned shall resort to the procedures provided for in Part XV.

3. Pending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to

jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation.

4. Where there is an agreement in force between the States concerned, questions relating to the delimitation of the exclusive economic zone shall be determined in accordance with the provisions of that agreement.

Article75

Charts and lists of geographical coordinates

1. Subject to this Part, the outer limit lines of the exclusive economic zone and the lines of delimitation drawn in accordance with article 74 shall be shown on charts of a scale or scales adequate for ascertaining their position. Where appropriate, lists of geographical coordinates of points, specifying the geodetic datum, may be substituted for such outer limit lines or lines of delimitation.

2. The coastal State shall give due publicity to such charts or lists of geographical coordinates and shall deposit a copy of each such chart or list with the Secretary-General of the United Nations.

PART XIII

MARINE SCIENTIFIC RESEARCH

SECTION 1. GENERAL PROVISIONS

Article 238

Right to conduct marine scientific research

All States, irrespective of their geographical location, and competent international organizations have the right to conduct marine scientific research subject to the rights and duties of other States as provided for in this Convention.

Article 239

Promotion of marine scientific research

States and competent international organizations shall promote and facilitate the development and conduct of marine scientific research in accordance with this Convention.

Article 240

General principles for the conduct of marine scientific research

In the conduct of marine scientific research the following principles shall apply:

(a) marine scientific research shall be conducted exclusively for peaceful purposes;

(b) marine scientific research shall be conducted with appropriate scientific methods and means compatible with this Convention;

(c) marine scientific research shall not unjustifiably interfere with other legitimate uses of the sea compatible with this Convention and shall be duly respected in the course of such uses;

(d) marine scientific research shall be conducted in compliance with all relevant regulations adopted in conformity with this Convention including those for the protection and preservation of the marine environment.

Article 241

Non-recognition of marine scientific research activities

as the legal basis for claims

Marine scientific research activities shall not constitute the legal basis for any claim to any part of the marine environment or its resources.

SECTION 2. INTERNATIONAL COOPERATION

Article 242

Promotion of international cooperation

1. States and competent international organizations shall, in accordance with the principle of respect for sovereignty and jurisdiction and on the basis of mutual benefit, promote international cooperation in marine scientific research for peaceful purposes.

2. In this context, without prejudice to the rights and duties of States under this Convention, a State, in the application of this Part, shall provide, as appropriate, other States with a reasonable opportunity to obtain from it, or with its cooperation, information necessary to prevent and control damage to the health and safety of persons and to the marine environment.

Article 243

Creation of favourable conditions

States and competent international organizations shall cooperate, through the conclusion of bilateral and multilateral agreements, to create favourable conditions for the conduct of marine scientific research in the marine environment and to integrate the efforts of scientists in studying the essence of phenomena and processes occurring in the marine environment and the interrelations between them.

Article 244

Publication and dissemination of information and knowledge

1. States and competent international organizations shall, in accordance with this Convention, make available by publication and dissemination through appropriate channels information on proposed major programmes and their objectives as well as knowledge resulting from marine scientific research.

2. For this purpose, States, both individually and in cooperation with other States and with competent international organizations, shall actively promote the flow of scientific data and information and the transfer of knowledge resulting from marine scientific research, especially to developing States, as well as the strengthening of the autonomous marine scientific research capabilities of developing States through, *inter alia*, programmes to provide adequate education and training of their technical and scientific personnel.

SECTION 3. CONDUCT AND PROMOTION OF MARINE SCIENTIFIC RESEARCH

Article 245

Marine scientific research in the territorial sea

Coastal States, in the exercise of their sovereignty, have the exclusive right to regulate, authorize and conduct marine scientific research in their territorial sea. Marine scientific research therein shall be conducted only with the express consent of and under the conditions set forth by the coastal State.

Article 246

Marine scientific research in the exclusive economic zone

and on the continental shelf

1. Coastal States, in the exercise of their jurisdiction, have the right to regulate, authorize and conduct marine scientific research in their exclusive economic zone and on their continental shelf in accordance with the relevant provisions of this Convention.

2. Marine scientific research in the exclusive economic zone and on the continental shelf shall be conducted with the consent of the coastal State.

3. Coastal States shall, in normal circumstances, grant their consent for marine scientific research projects by other States or competent international organizations in their exclusive economic zone or on their continental shelf to be carried out in accordance with this Convention exclusively for peaceful purposes and in order to increase scientific knowledge of the marine environment for the benefit of all mankind. To this end, coastal States shall establish rules and procedures ensuring that such consent will not be delayed or denied unreasonably.

4. For the purposes of applying paragraph 3, normal circumstances may exist in spite of the absence of diplomatic relations between the coastal State and the researching State.

5. Coastal States may however in their discretion withhold their consent to the conduct of a marine scientific research project of another State or competent international organization in the exclusive economic zone or on the continental shelf of the coastal State if that project:

(a) is of direct significance for the exploration and exploitation of natural resources, whether living or non-living;

(b) involves drilling into the continental shelf, the use of explosives or the introduction of harmful substances into the marine environment;

(c) involves the construction, operation or use of artificial islands, installations and structures referred to in articles 60 and 80;

(d) contains information communicated pursuant to article 248 regarding the nature and objectives of the project which is inaccurate or if the researching State or competent international

organization has outstanding obligations to the coastal State from a prior research project.

6. Notwithstanding the provisions of paragraph 5, coastal States may not exercise their discretion to withhold consent under subparagraph (a) of that paragraph in respect of marine scientific research projects to be undertaken in accordance with the provisions of this Part on the continental shelf, beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, outside those specific areas which coastal States may at any time publicly designate as areas in which exploitation or detailed exploratory operations focused on those areas are occurring or will occur within a reasonable period of time. Coastal States shall give reasonable notice of the designation of such areas, as well as any modifications thereto, but shall not be obliged to give details of the operations therein.

7. The provisions of paragraph 6 are without prejudice to the rights of coastal States over the continental shelf as established in article 77.

8. Marine scientific research activities referred to in this article shall not unjustifiably interfere with activities undertaken by coastal States in the exercise of their sovereign rights and jurisdiction provided for in this Convention.

Article 247

Marine scientific research projects undertaken

by or under the auspices of international organizations

A coastal State which is a member of or has a bilateral agreement with an international organization, and in whose exclusive economic zone or on whose continental shelf that organization wants to carry out a marine scientific research project, directly or under its auspices, shall be deemed to have authorized the project to be carried out in conformity with the agreed specifications if that State approved the detailed project when the decision was made by the organization for the undertaking of the project, or is willing to participate in it, and has not expressed any objection within four months of notification of the project by the organization to the coastal State.

Article 248

Duty to provide information to the coastal State

States and competent international organizations which intend to undertake marine scientific research in the exclusive economic zone or on the continental shelf of a coastal State shall, not less than six months in advance of the expected starting date of the marine scientific research project, provide that State with a full description of:

(a) the nature and objectives of the project;

(b) the method and means to be used, including name, tonnage, type and class of vessels and a description of scientific equipment;

(c) the precise geographical areas in which the project is to be conducted;

(d) the expected date of first appearance and final departure of the research vessels, or deployment of the equipment and its removal, as appropriate;

(e) the name of the sponsoring institution, its director, and the person in charge of the project; and

(f) the extent to which it is considered that the coastal State should be able to participate or to be represented in the project.

Article 249

Duty to comply with certain conditions

1. States and competent international organizations when undertaking marine scientific research in the exclusive economic zone or on the continental shelf of a coastal State shall comply with the following conditions:

(a) ensure the right of the coastal State, if it so desires, to participate or be represented in the marine scientific research project, especially on board research vessels and other craft or scientific research installations, when practicable, without payment of any remuneration to the scientists of the coastal State and without obligation to contribute towards the costs of the project;

(b) provide the coastal State, at its request, with preliminary reports, as soon as practicable, and with the final results and conclusions after the completion of the research;

(c) undertake to provide access for the coastal State, at its request, to all data and samples derived from the marine scientific research project and likewise to furnish it with data which may be copied and samples which may be divided without detriment to their scientific value;

(d) if requested, provide the coastal State with an assessment of such data, samples and research results or provide assistance in their assessment or interpretation;

(e) ensure, subject to paragraph 2, that the research results are made internationally available through appropriate national or international channels, as soon as practicable;

(f) inform the coastal State immediately of any major change in the research programme;

(g) unless otherwise agreed, remove the scientific research installations or equipment once the research is completed.

2. This article is without prejudice to the conditions established by the laws and regulations of the coastal State for the exercise of its discretion to grant or withhold consent pursuant to article 246, paragraph 5, including requiring prior agreement for making internationally available the research results of a project of direct significance for the exploration and exploitation of natural resources.

Article 250

Communications concerning marine scientific research projects

Communications concerning the marine scientific research projects shall be made through appropriate official channels, unless otherwise agreed.

Article 251

General criteria and guidelines

States shall seek to promote through competent international organizations the establishment of general criteria and guidelines to assist States in ascertaining the nature and implications of marine scientific research.

Article 252

Implied consent

States or competent international organizations may proceed with a marine scientific research project six months after the date upon which the information required pursuant to article 248 was provided to the coastal State unless within four months of the receipt of the communication containing such information the coastal State has informed the State or organization conducting the research that:

(a) it has withheld its consent under the provisions of article 246; or

(b) the information given by that State or competent international organization regarding the nature or objectives of the project does not conform to the manifestly evident facts; or

(c) it requires supplementary information relevant to conditions and the information provided for under articles 248 and 249; or

(d) outstanding obligations exist with respect to a previous marine scientific research project carried out by that State or organization, with regard to conditions established in article 249.

Article 253

Suspension or cessation of marine scientific research activities

1. A coastal State shall have the right to require the suspension of any marine scientific research activities in progress within its exclusive economic zone or on its continental shelf if:

(a) the research activities are not being conducted in accordance with the information communicated as provided under article 248 upon which the consent of the coastal State was based; or

(b) the State or competent international organization conducting the research activities fails to comply with the provisions of article 249 concerning the rights of the coastal State with respect to the marine scientific research project.

2. A coastal State shall have the right to require the cessation of any marine scientific research activities in case of any non-compliance with the provisions of article 248 which amounts to a major change in the research project or the research activities.

3. A coastal State may also require cessation of marine scientific research activities if any of the situations contemplated in paragraph 1 are not rectified within a reasonable period of time.

4. Following notification by the coastal State of its decision to order suspension or cessation, States or competent international organizations authorized to conduct marine scientific research activities shall terminate the research activities that are the subject of such a notification.

5. An order of suspension under paragraph 1 shall be lifted by the coastal State and the marine scientific research activities allowed to continue once the researching State or competent international organization has complied with the conditions required under articles 248 and 249.

Article 254

Rights of neighbouring land-locked

and geographically disadvantaged States

1. States and competent international organizations which have submitted to a coastal State a project to undertake marine scientific research referred to in article 246, paragraph 3, shall give notice to the neighbouring land-locked and geographically disadvantaged States of the proposed research project, and shall notify the coastal State thereof.

2. After the consent has been given for the proposed marine scientific research project by the coastal State concerned, in accordance with article 246 and other relevant provisions of this Convention, States and competent international organizations undertaking such a project shall provide to the neighbouring land-locked and geographically disadvantaged States, at their request and when appropriate, relevant information as specified in article 248 and article 249, paragraph 1(f).

3. The neighbouring land-locked and geographically disadvantaged States referred to above shall, at their request, be given the opportunity to participate, whenever feasible, in the proposed marine scientific research project through qualified experts appointed by them and not objected to by the coastal State, in accordance with the conditions agreed for the project, in conformity with the provisions of this Convention, between the coastal State concerned and the State or competent international organizations conducting the marine scientific research.

4. States and competent international organizations referred to in paragraph 1 shall provide to the above-mentioned land-locked and geographically disadvantaged States, at their request, the information and assistance specified in article 249, paragraph 1(d), subject to the provisions of article 249, paragraph 2.

Article 255

Measures to facilitate marine scientific research

and assist research vessels

States shall endeavour to adopt reasonable rules, regulations and procedures to promote and facilitate marine scientific research conducted in accordance with this Convention beyond their territorial sea and, as appropriate, to facilitate, subject to the provisions of their laws and regulations, access to their harbours and promote assistance for marine scientific research vessels which comply with the relevant provisions of this Part.

Article 256

Marine scientific research in the Area

All States, irrespective of their geographical location, and competent international organizations have the right, in conformity with the provisions of Part XI, to conduct marine scientific research in the Area.

Article 257

Marine scientific research in the water column

beyond the exclusive economic zone

All States, irrespective of their geographical location, and competent international organizations have the right, in conformity with this Convention, to conduct marine scientific research in the water column beyond the limits of the exclusive economic zone.

SECTION 4. SCIENTIFIC RESEARCH INSTALLATIONS OR EQUIPMENT IN THE MARINE ENVIRONMENT

Article 258

Deployment and use

The deployment and use of any type of scientific research installations or equipment in any area of the marine environment shall be subject to the same conditions as are prescribed in this Convention for the conduct of marine scientific research in any such area.

Article 259

Legal status

The installations or equipment referred to in this section do not possess the status of islands. They have no territorial sea of their own, and their presence does not affect the delimitation of the territorial sea, the exclusive economic zone or the continental shelf.

Article 260

Safety zones

Safety zones of a reasonable breadth not exceeding a distance of 500 metres may be created around scientific research installations in accordance with the relevant provisions of this Convention. All States shall ensure that such safety zones are respected by their vessels.

Article 261

Non-interference with shipping routes

The deployment and use of any type of scientific research installations or equipment shall not constitute an obstacle to established international shipping routes.

Article 262

Identification markings and warning signals

Installations or equipment referred to in this section shall bear identification markings indicating the State of registry or the international organization to which they belong and shall have adequate internationally agreed warning signals to ensure safety at sea and the safety of air navigation, taking into account rules and standards established by competent international organizations.

SECTION 5. RESPONSIBILITY AND LIABILITY

Article 263

Responsibility and liability

1. States and competent international organizations shall be responsible for ensuring that marine scientific research, whether undertaken by them or on their behalf, is conducted in accordance with this Convention.

2. States and competent international organizations shall be responsible and liable for the measures they take in contravention of this Convention in respect of marine scientific research conducted by other States, their natural or juridical persons or by competent international organizations, and shall provide compensation for damage resulting from such measures.

3. States and competent international organizations shall be responsible and liable pursuant to article 235 for damage caused by pollution of the marine environment arising out of marine scientific research undertaken by them or on their behalf.

SECTION 6. SETTLEMENT OF DISPUTES AND INTERIM MEASURES

Article 264

Settlement of disputes

Disputes concerning the interpretation or application of the provisions of this Convention with regard to marine scientific research shall be settled in accordance with Part XV, sections 2 and 3.

Article 265

Interim measures

Pending settlement of a dispute in accordance with Part XV, sections 2 and 3, the State or competent international organization authorized to conduct a marine scientific research project shall not allow research activities to commence or continue without the express consent of the coastal State concerned.

PRC Law on the Exclusive Economic Zone and Continental Shelf

(Adopted at the third session of the Standing Committee of the Ninth National People's Congress, 26 June 1998)

Article 1

This Act is adopted with a view to safeguarding the sovereign rights and jurisdiction exercised by the People's Republic of China over the exclusive economic zone and the continental shelf and to protect China's maritime rights and interests.

Article 2

The exclusive economic zone of the People's Republic of China is an area beyond and adjacent to the territorial sea of the People's Republic of China extending to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.

The continental shelf of the People's Republic of China comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.

Conflicting claims regarding the exclusive economic zone and the continental shelf by the People's Republic of China and States with opposite or adjacent coasts shall be settled, on the basis of international law and in accordance with the principle of equity, by an agreement delimiting the areas so claimed.

Article 3

In the exclusive economic zone the People's Republic of China shall exercise sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, current and winds.

The People's Republic of China shall have jurisdiction in the exclusive economic zone with regard to the establishment and use of artificial islands, installations and structures; marine scientific research; and the protection and preservation of the marine environment.

The natural resources of the exclusive economic zone referred to in this Act include living and non-living resources.

Article 4

The People's Republic of China shall exercise sovereign rights over the continental shelf for the purpose of exploring it and exploiting its natural resources.

The People's Republic of China shall have jurisdiction over the continental shelf with regard to the establishment and use of artificial islands, installations and structures; marine scientific research; and the protection and preservation of the marine environment.

The People's Republic of China shall have the exclusive right to authorize and regulate drilling on the continental shelf for all purposes.

The natural resources of the continental shelf referred to in this Act consist of the mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil.

Article 5

Any international organization, foreign organization or individual entering the exclusive economic zone of the People's Republic of China to engage in fishery activities must have the approval of the competent authorities of the People's Republic of China and comply with the laws and regulations of the People's Republic of China and any treaties or agreements concluded by the relevant States and the People's Republic of China.

The competent authorities of the People's Republic of China shall have the right to take any necessary conservation and management measures to ensure that the living resources of the exclusive economic zone are not endangered by over-exploitation.

Article 6

The competent authorities of the People's Republic of China shall have the right to conserve and manage the straddling fish stocks, highly migratory fish stocks and marine mammals of the exclusive economic zone, anadromous stocks originating in the rivers of the People's Republic of China and catadromous species that spend the greater part of their life cycle in the waters of the People's Republic of China.

The People's Republic of China shall have the primary interest in anadromous stocks originating in China's rivers.

Article 7

Any international organization, foreign organization or individual engaging in the exploration or exploitation of the natural resources of the exclusive economic zone or continental shelf of the People's Republic of China or to carry out drilling in the continental shelf of the People's Republic of China must have the approval of the competent authorities of the People's Republic of China and comply with the laws and regulations of the People's Republic of China.

Article 8

The People's Republic of China shall have exclusive rights in the exclusive economic zone and the continental shelf to establish and to authorize and regulate the establishment, operation and use of artificial islands, installations and structures.

The People's Republic of China shall have exclusive jurisdiction over the artificial islands, installations and structures in the exclusive economic zone and the continental shelf, including jurisdiction with regard to customs, fiscal, health, security and immigration laws and regulations.

The competent authorities of the People's Republic of China shall have the right to establish safety zones around the artificial islands, installations and structures in the exclusive economic zone and continental shelf in which they may take appropriate measures to ensure the safety both of navigation and of the artificial islands, installations and structures.

Article 9

Any international organization, foreign organization or individual engaging in marine scientific research in the exclusive economic zone and continental shelf of the People's Republic of China must have the approval of the competent authorities of the People's Republic of China and shall comply with the laws and regulations of the People's Republic of China.

Article 10

The competent authorities of the People's Republic of China shall have the right to take the necessary measures to prevent, reduce and control pollution of the marine environment and to protect and preserve the marine environment of the exclusive economic zone and the continental shelf.

Article 11

Any State, provided that it observes international law and the laws and regulations of the People's Republic of China, shall enjoy in the exclusive economic zone and the continental shelf of the People's Republic of China freedom of navigation and overflight and of laying submarine cables and pipelines, and shall enjoy other legal and practical marine benefits associated with these freedoms. The laying of submarine cables and pipelines must be authorized by the competent authorities of the People's Republic of China.

Article 12

The People's Republic of China may, in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources of the exclusive economic zone, take such measures, including boarding, inspection, arrest, detention and judicial proceedings, as may be necessary to ensure compliance with its laws and regulations.

In the event of a violation of the laws and regulations of the People's Republic of China in the exclusive economic zone or the continental shelf, the People's Republic of China shall have the right to take the necessary investigative measures in accordance with the law and may exercise the right of hot pursuit.

Article 13

Rights enjoyed by the People's Republic of China in the exclusive economic zone and the continental shelf that are not stipulated in this Act shall be exercised in accordance with international law and the laws and regulations of the People's Republic of China.

Article 14

The provisions of this Act shall not affect the historical rights of the People's Republic of China.

Article 15

The Government of the People's Republic of China may, in accordance with this Act, enact relevant regulations.

Article 16

This Act shall enter into force on the date of promulgation.

Note on fieldwork and sources

The majority of the fieldwork informing this study was conducted over 12 months on a Department of Education Fulbright-Hayes Doctoral Dissertation Research Award in 2014 and 2015. During this time, I secured an affiliation as a visiting scholar with the PRC National Institute for South China Sea Studies (NISCSS) in Hainan province. As a guest of a state think- tank, I enjoyed extraordinary access to some of the leading scholars, policy experts, and practitioners in the PRC maritime law and policy field. Not only was I able to establish professional and personal relationships with many of the Fellows at the institute (some of whom are among the most knowledgeable and internationally recognizable advocates for PRC maritime policy), but the affiliation made it much easier for me to meet with officials in the State Oceanic Administration, Ministry of Foreign Affairs, People's Liberation Army, National People's Congress, and experts from various universities and think-tanks across the PRC. Organizational constraints within the PRC bureaucracy tend to limit foreign access, but my status (as a visitor of a state organization) allowed them to speak with me without undue bureaucratic hassle. Where it still proved difficult to meet with officials, many were willing to meet with me over coffee, or to chat on the wings of the many conferences and workshops I attended during that year.

Because of the extraordinary political sensitivity of these issues in the contemporary PRC, I conducted only a very small number of formal interviews, opting instead for informal discussions when guests visited NISCSS programs and events, and through conversations at the many workshops and conferences at which I presented (or at least attended). While it is unfair to say that there was total homogeneity in the views these PRC interlocutors expressed, it would be even more inaccurate to say that there was not substantial consensus on the fundamental "correctness" of PRC law, policy, or practice on these issues. There was some variation in the ways that they explained the purpose and function of PRC conduct in this domain, but no "dissenting views" on its basic appropriateness. Different agencies and departments predictably focused on those areas most closely related to their responsibilities, so my most substantive discussions on law unsurprising came from those with law of the sea portfolios. Those with purely political

duties were, on balance, somewhat more dismissive of the "constraining" effects of international law and repeatedly cited, almost verbatim, the litany of Chinese grievances about "unequal treaties" and decried the perversity and hypocrisy of the US position on international law, UNCLOS in particular. Many of the law of the sea experts were somewhat more hesitant to downplay the importance of UNCLOS obligations, but rather gave substantially more emphasis to various doctrines of international law that might allow them to change gradually, especially through customary international law. That this mechanism of change was broadly shared across departments and areas of law of the sea expertise is indicative of the substantial consensus on the instrumental qualities of international law, and highlighted its secondary role in PRC statecraft.

That consensus, in my view, is largely a product of a PRC legal education curriculum and mode of pedagogy that are obliged to reflect, rather than shape or critique, the political demands of the day. This is a system of education to which I also enjoyed privileged access. My affiliation with NISCSS was secured by a Tsinghua law professor, whose graduate seminar on the law of the sea I audited in the winter of 2014. I also lectured in his class, comparing US and Chinese practice of the law of the sea. Additionally, in both 2012 and 2014, I spent substantial time with the law and international relations faculty at Peking University, attending talks on the law of the sea and participating in several workshops with faculty and their guests from state think-tanks. These curricula and scholars consistently delivered the message that international law is a political instrument, originally wielded by the West against China, but now increasingly viable as a tool of Chinese statecraft. I observed the impact of this pedagogy in discussions with several masters and doctoral students at both universities, whose research agendas and career trajectories were explicitly determined by the substantive issues and professional roles promoted by the CCP.

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